EXHIBIT C

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
DOROTHY BROWN CLERK

Atty. No. 41106

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BALLARD RN CENTER, INC. f/k/a BALLARD NURSING CENTER, INC.,	)	
Plaintiff,	)	10 CH 17229
v.	)	Judge Cohen
KOHLL'S PHARMACY & HOMECARE, INC., and JOHN DOES 1-10,	)	
Defendants.	)	

NOTICE OF MOTION

TO: Please see Certificate of Service.

PLEASE TAKE NOTICE that on Nov 27th, 2012 at 10:00 a.m., we shall appear before Judge Cohen in Room 2308 of the Richard J. Daley Center and then and there present: **PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION**, a copy of which is attached and hereby served upon you.

Julie Clark
Julie Clark

Daniel A. Edelman
Julie Clark
Heather A. Kolbus
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
120 S. LaSalle Street, Suite 1800
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)

CERTIFICATE OF SERVICE

I, Julie Clark, certify that I had a copy of the foregoing document sent on November 19, 2012, by United States mail and electronic mail to the parties named below:

Amir R. Tahmassebi
Konicek & Dillon, P.C.
21 W. State Street
Geneva, IL 60134
amir@konicekdillonlaw.com

Julie Clark

Daniel A. Edelman
Julie Clark
Heather A. Kolbus
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
120 S. LaSalle Street, Suite 1800
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)

Atty. No. 41106

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED
2012 NOV ... PM 3:44
CLERK OF CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIV.
DOROTHY BROWN CLERK

BALLARD RN CENTER, INC. f/k/a BALLARD NURSING CENTER, INC.,	)	
Plaintiff,	)	10 CH 17229
v.	)	Judge Cohen
KOHLL'S PHARMACY & HOMECARE, INC., and JOHN DOES 1-10,	)	
Defendants.	)	

PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION

Plaintiff Ballard RN Center, Inc. f/k/a Ballard Nursing Center, Inc. ("Plaintiff") respectfully requests that this Court enter an order determining that this action may proceed on behalf of a class against Defendant Kohll's Pharmacy & Homecare, Inc. ("Kohll's" or "Defendant"). The class consists of (a) all parties (b) who, on or about March 3, 2010, (c) were sent advertising faxes by defendant (d) and with respect to whom defendant cannot provide evidence of consent or a prior business relationship[1].

In support of this motion, plaintiff states:

I. NATURE OF THE CASE

1. Plaintiff brought this action after receiving an unsolicited and unwanted advertising fax (Exhibit A) sent by Kohll's. Plaintiff alleges that Kohll's violated the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") (Count I), that Kohll's violated the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA") (Count II); and committed the tort of conversion

[1] Having conducted discovery, Plaintiff has revised and limited the Class Definition from that included in its original motion for Class Certification filed on April 20, 2012.

(Count III).

2. The TCPA and implementing Federal Communications Commission regulations (Count I) make it illegal to send unsolicited advertising faxes without the recipient's "express invitation or permission," 47 U.S.C. §227(a)(4); 47 C.F.R. §64.1200(f)(5). The ability to "opt out" is not sufficient.

3. Plaintiff contends (Count II) that the transmission of unsolicited advertising faxes is also an unfair practice that violates §2 of the ICFA, 815 ILCS 505/2. The prohibitions of "unfair" and "deceptive" practices are distinct. Elder v. Coronet Ins. Co., 201 Ill.App.3d 733, 558 N.E.2d 1312 (1st Dist. 1990). In determining whether a practice is "unfair," both federal and state law consider:

> **(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness;**
>
> **(2) whether it is immoral, unethical, oppressive or unscrupulous;**
>
> **(3) whether it causes substantial injury to consumers (or competitors or other businessmen).**

FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n. 5 (1972); Robinson v. Toyota Motor Credit Corp., 201 Ill.2d 403, 775 N.E.2d 951 (2002); Scott v. Association for Childbirth at Home, Int'l, 88 Ill.2d 279, 430 N.E.2d 1012 (1981); Elder v. Coronet Ins. Co., supra.

4. Plaintiff further contends (Count III) that Defendant converted the paper and toner in his fax machine to its own use by using them to print unsolicited and unwanted advertising faxes illegally sent to plaintiffs. The elements of conversion are (1) plaintiffs' right to the property

at issue, (2) plaintiffs' absolute and unconditional right to immediate possession of the property; (3) defendants' assertion of dominion and control over the property; and (4) notice of plaintiffs' rights. The fourth element is satisfied when the taking of the property is wrongful in the first instance, as in the case of theft; otherwise, it can be satisfied by demand. Stathis v. Geldermann, Inc., 258 Ill.App.3d 690, 630 N.E.2d 926 (1st Dist. 1994); Jensen v. Western & Indiana R. Co., 94 Ill.App.3d 915, 419 N.E.2d 578 (1st Dist. 1981); Bruner v. Dyball, 42 Ill. 34 (1866). Plaintiff clearly owned and had an absolute and unconditional right to the paper and toner; by causing them to be used to print their unsolicited advertisements, Kohll's converted the paper and toner and rendered them unusable by plaintiff; Kohll's knew that it had no right to the paper and toner and was in effect stealing them.

II. REQUIREMENTS FOR CLASS CERTIFICATION

5. Section 2-801 of the Illinois Code of Civil Procedure states:

> **Prerequisites for the maintenance of a class action.**
>
> **An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:**
>
> **(1) The class is so numerous that joinder of all members is impracticable.**
>
> **(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.**
>
> **(3) The representative parties will fairly and adequately protect the interest of the class.**
>
> **(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.**

6. Class actions are essential to enforce laws protecting consumers. As the

Illinois Appellate Court stated in Eshaghi v. Hanley Dawson Cadillac Co., 214 Ill. App. 3d 995, 574 N.E.2d 760 (1st Dist. 1991):

> **In a large and impersonal society, class actions are often the last barricade of consumer protection. . . . To consumerists, the consumer class action is an inviting procedural device to cope with frauds causing small damages to large groups. The slight loss to the individual, when aggregated in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The alternatives to the class action -- private suits or governmental actions -- have been so often found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured, and deterrence of the wrongdoer.**
> (574 N.E.2d at 764, 766)

7. In determining whether a class action will be allowed, the Court should resolve any doubt regarding the propriety of certification "in favor of allowing the class action," so that it will remain an effective vehicle for deterring corporate wrongdoing. Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968); accord, In re Folding Cartons Antitrust Litigation, 75 F.R.D. 727 (N.D. Ill. 1977). Finally, the class action determination is to be made as soon as practicable after the commencement of an action brought as a class action, and before any consideration of the merits (§2-802 of the Code of Civil Procedure).

8. As demonstrated below, each of the requirements for class certification is met.

A. Numerosity

9. The numerosity requirement is satisfied if it is reasonable to conclude that the number of members of the proposed class is greater than the minimum number required for class certification, which is about 10-40. Kulins v. Malco, 121 Ill. App. 3d 520, 530, 459 N.E.2d 1038 (1st Dist. 1984) (19 and 47 sufficient); Swanson v. American Consumer Industries, 415 F.2d 1326, 1333 (7th Cir. 1969) (40 class members suffic ient); Cypress v. Newport News General &

Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967) (18 sufficient); Riordan v. Smith Barney, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (10-29 sufficient); Sala v. National R. Pass. Corp., 120 F.R.D. 494, 497 (E.D. Pa. 1988) (40-50 sufficient); Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 184 (N.D. Ill. 1992) (72 class members).

10. It is not necessary that the precise number of class members be known: "A class action may proceed upon estimates as to the size of the proposed class." In re Alcoholic Beverages Litigation, 95 F.R.D. 321, 324 (E.D.N.Y. 1982). The court may "make common sense assumptions in order to find support for numerosity." Evans v. United States Pipe & Foundry, 696 F.2d 925, 930 (11th Cir. 1983). "[T]he court may assume sufficient numerousness where reasonable to do so in absence of a contrary showing by defendant, since discovery is not essential in most cases in order to reach a class determination . . . Where the exact size of the class is unknown, but it is general knowledge or common sense that it is large, the court will take judicial notice of this fact and will assume joinder is impracticable." 2 Newberg on Class Actions (3d ed. 1992), §7.22.A.

11. Discovery has revealed that Defendant contracted with Red Door Marketing, list service provider, for the purchase of thousands of fax numbers of businesses located throughout the U.S. (See Exhibit B, Def. Resp to Interrogatory No. 4)

12. Discovery has also shown that defendant utilized the services of Westfax.com in connection with the transmission of numerous fax advertisements and most significantly, the advertisement at issue in the case. Attached as Exhibit C are documents related to and reflecting the agreement between Kohll's and Westfax.com. Additionally, Exhibit D is a printout of the "Fax Order Detail" specifically related to the Corporate Flu Shots fax that occurred on March 3, 2010. Id. As indicated therein, Kohll's, via Ms. Laurie Dondelinger, utilized a file named "Corporate Flu

Shots Blast Fax" and had it tranmsitted to a list named "Corp List_DesMoines_StLouis_Chicago_Omaha Cos.csv corp fax list. As indicated in the work order summary, the list consisted of 4,760 total fax numbers (and thus) 4,760 total pages. Id. Additionally, the fax list file name shown on Exhibit D corresponds with the fax list obtained from Ms. Laurie Dondelinger's computer. Attached as Exhibit E is a representative sample (with portions of phone number, fax number and employee names redacted) of the fax list showing 49 of the 4,760 parties to which Defendant sent its faxes.

13. Laurie Dondelinger also promptly emailed several persons within the office and informed her coworkers and superiors that the transmission had taken place, ensuring that everyone be prepared for the expected influx of calls. Her email restates the information contained in the "Fax Order Detail and invoice, "4,760 faxes just went out (estimated at $150 if ALL go through - we pay $0.04 per fax that goes through)... (Exhibit F).

14. The target audience for receipt of Exhibit A included corporate entities located in several large midwestern cities as reflected in the fax list file name designation on Exhibit D. The invoice related to the faxing in fact shows that 4,142 of the 4,160 faxes were successfully transmitted and Kohll's was charged $165.68 ($0.04 per fax) for the fax services (Exhibit G). Id. In addition to the invoice, Kohll's received a detailed report which indicates exactly which 4,160 numbers it sent the advertisement to and what the status was as to each transmission. *See* sample of transmission report, Exhibit H. Attached as Exhibit H is a representative sample (with portions of each fax number redacted) of transmission report).

This plainly satisfies the numerosity requirement.

15. Defendant has also failed to present any evidence that any of the faxes were

sent because the recipient had consented or because of any prior relationship with the recipient. In contrast, due to the fact that defendant purchased the list from a third party, it is clear that the existence of a relationship between the defendant and any party on the list would have been entirely coincidental.

B. Common Questions

16. The commonality requirement is satisfied if there are common questions linking the class members that are substantially related to the outcome of the litigation. Blackie v. Barrack, 524 F.2d 891, 910 (9th Cir. 1975). Common questions predominate if classwide adjudication of the common issues will significantly advance the adjudication of the merits of all class members' claims. McClendon v. Continental Group, Inc., 113 F.R.D. 39, 43-44 (D.N.J. 1986); Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 114 F.R.D. 48, 52 (S.D.N.Y. 1987); Spicer v. Chicago Board Options Exchange, CCH Fed.Sec.L.Rptr. [1989-90 Transfer Binder] ¶94,943, at p. 95,254 (N.D. Ill. 1990); Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987). The "common questions" may be the existence and legality of a standard business practice. Haywood v. Superior Bank, 244 Ill. App. 3d 326, 614 N.E.2d 461, 464 (1st Dist. 1993); Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 774 (N.D. Ill. 1989). Where a case involves "standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement . . . is usually met." Franklin v. City of Chicago, 102 F.R.D. 944, 949 (N.D.Ill. 1984); Patrykus v. Gomilla, 121 F.R.D. 357, 361 (N.D. Ill. 1988).

17. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;

b. Whether defendant thereby violated the TCPA;

c. Whether defendant thereby converted plaintiffs' toner and paper;

d. Whether defendant thereby engaged in unfair and deceptive acts and practices, in violation of the ICFA.

18. The class is defined in terms of Illinois residents who were sent advertising faxes by defendant and with respect to whom defendant cannot provide evidence of express consent or a prior relationship. Here, defendant obtained the list by purchase (Exhibits B, D). The possibility that any single person or entity who received one of defendant's advertisements may have been an existing customer would be largely coincidental and does not give rise to an existing business relationship defense, even assuming there is such a defense, because the FCC treats the EBR defense as a species of consent, which means that in order for such an argument to apply, the fax must have been sent *because of* the relationship.

19. Further, the fact that defendant conducted a "blast fax" ad gives rise to the conclusion that consent was lacking and that the faxes were not sent *because of* an existing relationship. Whiting Corporation v. Sungard Corbel, Inc., 03 CH 21135 (Cir. Ct. Cook Cty.) (Exhibit I). Jaynes v. Commonwealth of Virginia, No. 062388 slip. op. at 28 (S.C. Va., Feb. 29, 2008) (Exhibit J).

20. As explained, the testimony has shown that the class sought to be certified in this case is very similar to that which this Court certified in the cases of Rawson v. Comfort Inn O'Hare, No. 03 CH 15165 (Cir. Ct. Cook Co., Sept. 30, 2005) (Exhibit K); Travel 100 Group Inc.

v. Empire Cooler Service, Inc., 2004 WL 3105679 (Ill. Cir.). Neither defendant claimed to have asked permission to send the faxes. Both the defendant here and that in the Travel 100 Group case utilized third party services in connection with their fax campaigns. As this Circuit explained in the Travel 100 Group case, "The manner in which the Defendant identified these recipients will not require individualized inquiry. Indeed, the Defendant's conduct may create a presumption that the facsimiles were not legal." Id. at 4.

21. Numerous courts have certified class actions under the TCPA: Sadowski v Med1Online, LLC 2008 U.S. Dist. LEXIS 12372 (N.D. Ill. May 27, 2008) Hinman v. M & M Rental Ctr., 521 F. Supp.2d 739 (N.D. Ill. Apr. 7, 2008) (for litigation purposes); Display South, Inc. Express Computer Supply, Inc., 961 So.2d 451 (La. App. 2007); Lampkin v. GGH, Inc., 146 P.3d 847 (Ok. App., 2006); Rawson v. C.P. Partners d/b/a Comfort Inn-O'Hare, 03 CH 15165 (Cook Co. Cir. Ct.); Telecommunications Design Network v. McLeodUSA, Inc., 03 CH 8477 (Cook Co. Cir. Ct.); CE Design v. Trade Show Network Marketing Group, Inc., No. 03 CH K 964 (Cir. Ct. Kane Co., Dec. 2, 2004); Travel 100 Group, Inc. v. Empire Cooler Service, Inc., 03 CH14510 (Cook Co. Cir. Ct .); Bogot v. Olympic Funding Chicago, No. 03 CH 11887 (Cook Co. Cir. Ct.); Stonecrafters, Inc. v. Wholesale Life Ins. Brokerage, Inc., 03 CH 435 (McHenry Co. Cir. Ct.); Rawson v. Robin Levin d/b/a The Ridgewood Organization, 03 CH 10844 (Cook Co. Cir. Ct.) (for settlement purposes); Kerschner v. Answer Illinois, Inc., 03 CH 21621 (Cook Co. Cir. Ct.) (for settlement purposes); Kerschner v. Murray and Trettel, Inc., 03 CH 21621 (Cook Co. Cir. Ct.) (for settlement purposes); Prints of Peace, Inc., d/b/a Printers, Inc. v. Enovation Graphic System, Inc., 03 CH 15167 (Cook Co. Cir. Ct.) (for settlement purposes); Law Office of Martha J. White, P.C. v. Morrissey Agency Inc., 03 CH 13549 (Cook Co. Cir. Ct.) (for settlement purposes); Kerschner v. Fitness

Image, Inc., 04 CH 00331 (Cook Co. Cir. Ct.) (for settlement purposes); INSPE Associates, Ltd., v. Charter One Bank, 03 CH 10965 (Cook Co. Cir. Ct.) (for settlement purposes); Bernstein v. New Century Mortgage Corp., 02 CH 06907 (Cook Co. Cir. Ct.) (for settlement purposes); Gans v Seventeen Motors, Inc., 01-L-478 (Madison Co. Cir. Ct.) (for settlement purposes); Telecommunications Network Design, Inc. v. Paradise Distributing, Inc., 03 CH 8483 (Cir. Ct. Cook Co., Feb. 1, 2006); Nicholson v. Hooters of Augusta, Inc., 245 Ga.App. 363, 537 S.E.2d 468 (2000); ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 203 Ariz. (App.) 94, 50 P.3d 844 (2002); Core Funding Group, LLC v. Young, 792 N.E.2d 547 (Ind.App. 2003); General Repair Services of Central Indiana, Inc. v. Soff-Cut International, Inc., 49D03-0109-CP-1464 (Marion Co., Ind. Super. Ct., Feb. 22, 2002); Gold Seal v. PrimeTV, No. 49C01-0112-CP-3010 (Marion County, Indiana, August 29, 2002); Kenro, Inc. v. APO Health, Inc., No. 49D12-0101-CP-000016 (Ind. Nov. 3, 2001) (same); Biggerstaff v. Ramada Inn and Coliseum, 98-CP-10-004722, (S.C. C.P., Feb. 3, 2000); Biggerstaff v. Marriott International, Inc., 99-CP-10-001366 (C.P. S.C., Feb 20, 2000); WPS, Inc. v. Lobel Financial, Inc., No 01CP402029 (C.P. S.C., Oct. 15, 2001) (same); Syrett v. Allstate Ins. Co., No. CP-02-32-0751 (S.C.C.P. Aug. 12, 2003) (same); Lipscomb v Wal-Mart Stores, Inc., No. 01-CP-20-263 (S.C.C.P. June 26, 2003) (same); Battery, Inc. v. United Parcel Service, Inc., No. 01-CP-10-2862 July 26, 2002) (same); Jemiola v. XYZ Corp., No. 411237 (C.P. Ohio, Dec. 21, 2001)(same); Salpietro v. Resort Exchange International, No. GD00-9071 (Allegheny Co. C.P.)(same); Chaturvedi v. JTH Tax, Inc., No. CD-01-008851 (Pa. C.P. Oct 1, 2001) (same); Dubsky v Advanced Cellular Communications, Inc., No. 2004 WL 503757 (Ohio C.P. Feb. 24, 2004) (same); Inhance Corp. v. Discount Vacation Rentals, No. LALA 004377 (Iowa Dist. Jan. 5, 2001) (same); Inhance Corp. v. Special T Travel Services, Inc., No. LALA 004362 (Iowa Dist. Dec. 8, 2000) (same). Several others were certified in a Louisiana federal court, against Kappa Publishing Group, Monroe Systems, and Satellink Paging (The Advocate, Capital City Press, Dec. 28, 2005, p. 1).

C. Adequacy of Representation

22. The adequacy of representation requirement involves two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (b) the plaintiffs must not have interests antagonistic to those of the class. Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992).

23. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Counsel's qualifications are set forth in Exhibit L. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

D. Appropriateness of Class Action

24. A class action is an appropriate method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims is small because generally the class members are unaware of their rights and have damages such that it is not feasible for them to bring individual actions. "[O]ne of the primary functions of the class suit is to provide a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." Brady v. LAC, Inc., 72 F.R.D. 22, 28 (S.D.N.Y. 1976).

25. The special efficacy of the consumer class action has been noted by the courts and is applicable to this case:

> **A class action permits a large group of claimants to have their claims**

adjudicated in a single lawsuit. This is particularly important where, as here, a large number of small and medium sized claimants may be involved. In light of the awesome costs of discovery and trial, many of them would not be able to secure relief if class certification were denied . . . .

In re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 732 (N.D. Ill. 1977) (citations omitted).

Another court has noted:

> **Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action. As Professors Wright, Miller, and Kane have discussed in analyzing consumer protection class actions such as the instant one, 'typically the individual claims are for small amounts, which means that the injured parties would not be able to bear the significant litigation expenses involved in suing a large corporation on an individual basis. These financial barriers may be overcome by permitting the suit to be brought by one or more consumers on behalf of others who are similarly situated.' 7B Wright et al., §1778, at 59; see, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ('Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.'). The public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a class action form.**

Lake v. First Nationwide Bank, 156 F.R.D. 615, 625 (E.D. Pa. 1994).

26. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g., for securities fraud.

WHEREFORE, plaintiffs request that the Court certify a class as requested.

Respectfully submitted,

Julie Clark

Julie Clark

Daniel A. Edelman
Julie Clark
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
120 S. LaSalle Street, 18th floor
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)
Atty. No. 41106

CERTIFICATE OF SERVICE

I, Julie Clark, certify that I had a copy of the foregoing document sent on November 19, 2012, by United States mail and electronic mail to the parties named below:

Amir R. Tahmassebi
Konicek & Dillon, P.C.
21 W. State Street
Geneva, IL 60134
amir@konicekdillonlaw.com

Julie Clark

Daniel A. Edelman
Julie Clark
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(312) 739-4200
(312) 419-0379 (FAX)

EXHIBIT A

Corporate Flu Shots

Only $16-$20 per vaccination

Did you know….

10 employees sick from the flu costs you $877.10

Each flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity

How much is the flu REALLY costing your company?

Protect your assets! Vaccinate your employees.

Call for a free quote today

(877) 408-1990

www.MyWorkWellness.com

Providing corporate vaccinations for over 15 years

A division of Kohll's Pharmacy & Homecare…trusted since 1948

EXHIBIT B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BALLARD NURSING CENTER, INC., Plaintiff,	)	
vs.	)	No. 2010 CH 17229
KOHLL'S PHARMACY & HOMECARE, INC., and JOHN DOES 1-10, Defendants.	)	

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

NOW COMES Defendant, KOHLL'S PHARMACY & HOMECARE, INC., by and through counsel, KONICEK & DILLON, P.C., and for their Answers to Plaintiff's Interrogatories states as follows:

INTERROGATORIES

1. Identify each person involved in answering these Interrogatories and the information supplied by each.

RESPONSE: Laurie Dondelinger, Marketing Manager, and David Kohll.

2. Identify each person involved in creating the document attached to the Complaint as Exhibit A.

RESPONSE: Laurie Dondelinger, Pam Chelesvig.

3. Identify the person(s) who sent the document attached to the Complaint as Exhibit A to Plaintiff, the telephone number of the sending machine, the owner of the sending machine, and the owner's telephone number.

RESPONSE: Laurie Dondelinger sent it through WestFax's website.

4. If Defendant contends Plaintiff consented to receive the document attached to the Complaint as Exhibit A, then identify the person(s) involved in obtaining that consent, the date(s) on which that consent was obtained, the person(s) who provided that consent, and each person involved in maintaining a log or other record of Plaintiffs consent.

RESPONSE: We don't knowif consent was received. We purchased the list from RedDoor Marketing which has since sold to DB101. The owner of RedDoor, Stacey Leslie, started up Trendy Data Management.

5. Identify the telephone numbers of every person other than Plaintiff who received a copy of the document attached to the Complaint as Exhibit A and the dates on which they received the document.

RESPONSE: Already supplied.

6. Identify each person involved in creating advertisement Defendant sent or caused to be sent by facsimile to any person from April 20, 2005 to the present.

RESPONSE: Laurie Dondelinger and Byron Carpenter.

7. Identify the person(s) who participated in Defendant's decision to send advertisement to facsimile machines from April 20, 2005 to the present.

RESPONSE: Laurie Dondelinger, David Kohll, Pam Chelesvig, Allen Kurland.

8. Identify the telephone service provider that provided data transmission service for the machine used to transmit the document attached to the Complaint as Exhibit A.

RESPONSE: WestFax.

9. Identify each telephone number used by Defendant in sending any facsimiles during the relevant period.

RESPONSE: 402-895-7655.

10. Identify any other manner by which Defendant has delivered facsimiles (including but not limited to computer software and home or personal fax numbers).

RESPONSE: 402-895-7655.

11. Identify each person who has been involved in formulating or establishing Defendant's policies or procedures concerning transmission of advertisement to facsimile machines.

RESPONSE: Allen Kurland. Kohll's has no set policies and procedures.

12. Describe in detail how Defendant obtained or developed a list of persons and/or fax numbers to which advertising faxes were sent. Include in your response (1) whether Defendant obtained possession of the list in any form, (2) if so, what happened to it, (3) whether any portion of the list was purchased, and if so, from whom and for how much, and (4) whether automatic dialing equipment was used to generate any list.

RESPONSE: RedDoor Marketing was the entity who processed information relating to the advertising faxes that existed. We are unaware of the lists that RedDoor maintains. We believe fees were paid to RedDoor Marketing for advertising services. We are not aware as to whether automatic dialing was used.

Respectfully Submitted,

Attorneys for KOHLL'S PHARMACY
& HOMECARE, INC.

Daniel F. Konicek
Amir Tahmassebi
KONICEK & DILLON, P.C.
Firm No. 37199
21 W. State St.
Geneva, IL 60134
630.262.9655

Attestation

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

David Kohll, being first duly sworn on oath, deposes and states that he is a defendant in the above-captioned matter; that he has read the foregoing document, and the responses made herein are true, correct and complete to the best of his knowledge and belief.

David Kohll

SUBSCRIBED and SWORN to before me this 12 day of July, 2011.

Joyce Jones

GENERAL NOTARY - State of Nebraska
JOYCE JONES
My Comm. Exp. March 2, 2012

EXHIBIT C

Amy Stark

4/14/05 updated users

WestFax

smart communication

621 17th Street Ste. 777 Denver, CO 80202

tel 303 299 9329 fax 303 292 0023 303-299-9309

WestFax Account Set-up Form

Thank you for choosing WestFax for your fax broadcast needs. Once you complete this form please fax back to ***303-292-0023. Questions, please call your sales representative at 800-473-6208.***

Billing Information

Billing Company: Kohll's Pharmacy & Homecare

Billing Contact: Laurie Brown

Phone: (402) 895-6812 **Ext:** 110

Fax: (402) 895-7655

E-mail: lbrown@kohlls.com

Address: 12741 Q St

City: Omaha **State:** NE **Zip:** 68137

Estimated Monthly Pages Faxed: 2500

Industry Type (Choose): Other

Special Billing Instructions: Laurie Brown, ~~Brett Branch~~ & Justin Kohll approved users. Amy Shiffler

Profile (User) Information

(If different from above)

Company: ~~EPC (division of Kohll's)~~ - Same as above. new multi always 3035 open

Contact: ~~Brett Branch~~ Laurie Brown

Phone: ~~970-454-2816~~ **Ext:**

Fax: ~~970-454-2041~~

E-mail: ~~bbranch@kohlls.com~~

Justin Kohll
JKohll@kohlls.com
402-408-0012
Amy Shiffler
AShiffler@kohlls.com
502-722-2042.

WestFax smart communication

WESTFAX, INC. CUSTOMER AGREEMENT

WestFax, Inc. ("WestFax") agrees to provide the services set forth in this agreement to Kohll's Pharmacy & Homecare/EPC, (the "Customer") in consideration of the Customer's acknowledgement and agreement to the following terms and conditions. The Customer hereby acknowledges and agrees to the terms and conditions set forth herein by accepting the services provided to it by WestFax.

1. **EFFECTIVE DATE.** This Agreement shall begin on the date WestFax first provides its services to the Customer. Provisions of Articles 3, 4, and 5 shall survive termination of this Agreement and be binding hereto.

2. **SERVICES.** WestFax will provide its services to the customer in consideration of payment of amounts specified for the services performed pursuant to this agreement and for the Customer's agreement to be bound by the terms and conditions set forth herein. The services provided by WestFax shall be set forth on a separate Work Order or "Broadcast Fax Order Form" provided by Customer to WestFax. All orders are subject to acceptance by WestFax prior to the orders being undertaken. All accepted orders shall be performed in accordance with the Customer's properly formatted instructions, documents, and databases transmitted to WestFax. WestFax is not responsible for any special instructions, additional specifications or additional services not set forth herein unless it specifically agrees in writing to such items in advance.

3. **PAYMENT.** WestFax will provide a summary invoice to the customer for the services it performs for the Customer on a regular basis. Payment of the invoice is due within ten (10) days after the date of the invoice. WestFax reserves the right to change the terms of payment for the Customer in general, and/or for any work order, including requiring pre-payment and/or canceling, suspending or rescheduling orders until the terms of payment have been agreed to by WestFax. Invoices that have not been paid within ten (10) days after due date are subject to a one and one-half per cent (1.5%) per month finance charge computed from the due date until paid by the Customer. The Customer agrees to pay all costs and expenses incurred by WestFax to collect any amount due hereunder or otherwise enforce the terms and conditions of this Agreement, including reasonable attorney fees and costs.

4. **COMPLIANCE WITH LAW.** The Customer acknowledges and agrees that WestFax is in the business of providing the medium to enable the Customer to make broadcast fax communications. WestFax is merely the agent providing the technology and medium for the Customer to send the broadcast fax and is not the advertiser or otherwise involved in any content contained in the fax broadcast communication. WestFax will provide its services only in strict compliance with applicable federal, state and local laws, rules and regulations. By requesting WestFax to provide services for its benefit, the Customer acknowledges and agrees that it will fully comply with such laws, rules and regulations, including in particular, the Telephone Consumer Protection Act ("TCPA") and all state laws similar or related thereto. The Customer agrees to fully release and discharge WestFax from any violation of any law or regulation, not to bring suit or any other claim against WestFax on account of such laws, and to fully defend, pay any damages and hold WestFax harmless from any violations of such federal, state and local laws, rules and regulations.

5. **LIMITATION OF LIABILITY.** WestFax's total liability for damages to the Customer or any third party for any service provided by WestFax to the Customer shall be limited to the amount charged to the Customer for the particular service performed by WestFax pursuant to the work order. IN NO EVENT SHALL WESTFAX BE LIABLE FOR ANY DIRECT, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS OR OTHER MONETARY LOSS, LOSS OR INTERRUPTION OF DATA, UNAUTHORIZED USE OF OR ACCESS TO DATA, PROGRAM ERRORS OR PATENT OR COPYRIGHT INFRINGEMENT CLAIMS.

6. **RECORDS.** WestFax shall have no obligation to maintain any Customer information or Customer Records (including billing information) in its database or in any other format. The Customer hereby acknowledges and agrees that all information and records may be deleted and/or destroyed at any time by WestFax. Customer also hereby consents to WestFax's summary invoices of services rendered and agrees to remit payment in accordance with such invoice.

7. **MISCELLANEOUS.** If any provision of this agreement is held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining portions of this agreement shall not be affected or impaired by such determination. This agreement is not assignable and any attempt to assign shall be void. The failure of either party to enforce any term or condition of this agreement shall not constitute a waiver of such party's right to enforce each and every term of this agreement. This agreement shall be interpreted and enforced in accordance with the laws of the State of Colorado.

I have read and agree to the terms and conditions listed above.

Signed:

Kohll's Pharmacy & Homecare

Company Name

Laurie Brown 12/21/04

Authorizing Signature & Date

Marketing Manager

Title

TOTAL P.03

WestFax
smart communication

ACCOUNT PROFILE FORM

Billing Information

Company: Kohll's Pharmacy & Homecare **Account Number:** 3024

Sales representative: ☑ Barry ☐ Jeff ☐ Amy ☐ Brad ☐ Evelyn ☐ Dominic

Account Type : ☑ New ☐ Winback ☐ Was Inactive "Now Active"

Price: Domestic: 0.0400 $25 Minimum: ☐ Canada Price:

Credit Rating : ☑ Green ☐ Yellow ☐ Red - Pre-Pay

Signed Contract: ☑
(All clients must have signed contract unless Barry or Jake sign off)

Profile Information

Removals

☑ Multi - New – 800-233-5096 (few records)
☐ Multi - Old – 800-440-6781 (15% will be removed)
☐ No (Client handles)
☐ Their Removal List - (WestFax stores their master removal list, client sends in additions to the removal list, we add the numbers to master removal list and then bounce against their fax list)
☐ Theirs and Multi New – (Fax lists are bounced against Multi New and their master stored removal list)
☐ Theirs and Multi Old – (Same as above with Multi Old)
☐ Custom Removal Line - (approval by Jake or Barry)
☐ WestFax Extension Removal Number - 800-440-5933

Reports are sent to following E-mail address: lbrown@kohlls.com

Type of report:
☑ Summary ☐ Detail (3) ☐ Exception (2) ☐ Detail No Fax Numbers (4)

Test Page Needed: ☑ Always ☐ No

CSID: ☑ Same as Profile Fax Number ☐ Same as Profile Phone Number
☐ Specify other:

Time of Day Preference: ☑ ASAP ☐ Scheduled ☐ On Peak
*If On Peak Specify Time zone: [redacted]

Server Open or Blocked: ☑ Open ☐ Blocked

OK - Barry
LISA
12/29/04
SH

EXHIBIT D

Online
(
(8

Kohll's Pharmacy & Homecar

Home
My Profile
My Products
New Fax Order
All Fax Orders
Custom Removals
Stored Lists
Quick Fax
Logout

Fax Order View

Fax Order Detail:

Name:	corp flu - corp fax list
PO #:	laurie
Date Created:	3/3/2010 11:55:41 PM
Created By:	Laurie Dondelinger
Status:	Complete

Document Detail:

File Name:	Corporate Flu Shots Blast Fax.dc
Upload Date:	3/3/2010
Page Count:	1
Status:	OK

View Document | Download Source | Downlo

Fax Lists:

Orig. File	Name	Uplo
Corp List_DesMoines_StLouis_Chicago_Omaha Cos.csv	corp fax list	3/

Schedule:

Start Date & Time: 3/3/2010 1:32 PM Mountain Tim

Work Order Summary:

Total Fax Numbers: 4760
Total Pages: 4760

Done

LEADING THE WAY TO BETTER COMMUNICATION.

West Fax report

< Prev   Page 1 of 1   Next >   Show Full Size

Corporate Flu Shots

Only $16-$20 per vaccination

Did you know….

10 employees sick from the flu costs you $877.10

Each flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity

How much is the flu REALLY costing your company?

Protect your assets! Vaccinate your employees.

Call for a free quote today

(877) 408-1990

www.MyWorkWellness.com

Providing corporate vaccinations for over 15 years

A division of Kohll's Pharmacy & Homecare...trusted since 1948

Removal From List Request

Westfax support of document sent

EXHIBIT E

Tab: "Corp List"

COMPANY NAME	MAILING ADDRES	CITY	STATE	ZIP CODE	MAILING	MAILING	STREET ADDRESS	STREET ADDRESS	STREET	STREET ADDRE	STREET	STREET # STREET
ABM Janitorial Svc	1509 Michigan St	Des Mc	IA	50314-3517	C082	92	1509 Michigan St	Des Moines	IA	50314-3517	92	C082
ADESA Des Moines	1800 SE Gateway I	Grimes	IA	50111-6601	R001	9	1800 SE Gateway Dr	Grimes	IA	50111-6601	9	R001
Adventure Lands Of America Inc	PO Box 3355	Des Mc	IA	50316-0355	B006	552	305 34th Ave NW	Altoona	IA	50009-2642	57	C003
Agricredit Acceptance LLC	PO Box 2000	Johnstc	IA	50131-0020	B050	8	8001 Birchwood Ct #	Johnston	IA	50131-2889	12	R009
AIB College Of Business	2500 Fleur Dr	Des Mc	IA	50321-1749	C088	8	2500 Fleur Dr	Des Moines	IA	50321-1749	8	C088
Alamo Group INC	1301 N 14th St	Indiano	IA	50125-1509	R005	11	1301 N 14th St	Indianola	IA	50125-1509	11	R005
Allied Insurance	3820 109th St	Des Mc	IA	50332-8106	C073	201	1100 Locust St # 200	Des Moines	IA	50391-2002	26	C001
Altoona Nursing & Rehab	200 7th Ave SW	Altoonz	IA	50009-1630	C005	6	200 7th Ave SW	Altoona	IA	50009-1630	6	C005
American Builders Supply	4458 NW Urbanda	Urband	IA	50322-7919	C068	589	4458 NW Urbandale	Urbandale	IA	50322-7919	589	C068
American Electronics	5355 NW 86th St	Johnstc	IA	50131-2781	R009	552	5355 NW 86th St	Johnston	IA	50131-2781	551	R009
American Equity Investmt Life	PO Box 71216	Des Mc	IA	50325-0216	B050	169	5000 Westown Pkwy	West Des Moine	IA	50266-5908	9	R033
American Republic Insurance Co	PO Box 9371	Des Mc	IA	50306-9371	B093	718	601 6th Ave	Des Moines	IA	50309-1605	11	C013
Anderson Erickson Dairy	2420 E University	Des Mc	IA	50317-6501	C056	200	2420 E University Av	Des Moines	IA	50317-6501	200	C056
ARAG Group	400 Locust St # 48	Des Mc	IA	50308-2337	C042	8	400 Locust St # 480	Des Moines	IA	50309-2337	8	C042
ARAMARK Uniform Svc	2500 Delaware Av	Des Mc	IA	50317-3599	C039	8	2500 Delaware Ave	Des Moines	IA	50317-3599	8	C039
Aspen Athletic Club	10930 Hickman Rc	Des Mc	IA	50325-3796	C027	307	10930 Hickman Rd	Des Moines	IA	50325-3796	307	C027
August Home Publishing	2150 Grand Ave	Des Mc	IA	50312-5304	C010	502	2150 Grand Ave	Des Moines	IA	50312-5304	502	C010
August Home Publishing Co	2200 Grand Ave	Des Mc	IA	50312-5306	C010	5	2200 Grand Ave	Des Moines	IA	50312-5306	5	C010
Baker Electric Inc	111 Jackson Ave	Des Mc	IA	50315-1200	C077	111	111 Jackson Ave	Des Moines	IA	50315-1200	111	C077
Baker Group	4224 Hubbell Ave	Des Mc	IA	50317-4508	C044	241	4224 Hubbell Ave	Des Moines	IA	50317-4508	341	C044
Bank Iowa Corp	1150 Jordan Creek	West D	IA	50266-5831	R067	509	1150 Jordan Creek Pl	West Des Moine	IA	50266-5831	509	R067
Bankers Trust Co NA	PO Box 897	Des Mc	IA	50306-0897	B450	876	453 7th St	Des Moines	IA	50309-4110	539	C035
Barr-Nunn Transportation Inc	PO Box 518	Grange	IA	50109-0518	B005	182	1803 Burr Oak Blvd	Granger	IA	50109-7729	37	R777
Barton Solvents Inc	PO Box 221	Des Mc	IA	50306-0221	B150	218	1920 NE Broadway A	Des Moines	IA	50313-2633	202	C016
Beaver Creek Elementary School	PO Box 10	Johnstc	IA	50131-0010	B050	108	8701 Lyndhurst Dr	Johnston	IA	50131-4705	13	R777
Behavioral Technologies	2601 E University	Des Mc	IA	50317-5323	C056	10	2601 E University Av	Des Moines	IA	50317-5323	10	C056
Bishop Drumm Care Ctr	5837 Winwood Dr	Johnstc	IA	50131-1651	R008	377	5837 Winwood Dr	Johnston	IA	50131-1651	377	R008
Bosselman Travel Ctr	3231 Adventurela	Altoon	IA	50009-9612	R002	314	3231 Adventureland	Altoona	IA	50009-9612	314	R002
Briggs Medical Svc Co	PO Box 1698	Des Mc	IA	50306-1698	B450	985	7300 Westown Pkwy	West Des Moine	IA	50266-2527	997	R068
Broadlawns Medical Ctr	1801 Hickman Rd	Des Mc	IA	50314-1597	C001	14	1801 Hickman Rd	Des Moines	IA	50314-1597	14	C001
Brown Winick Graves Gross	666 Grand Ave # 2	Des Mc	IA	50309-2510	C035	5	666 Grand Ave # 200	Des Moines	IA	50309-2510	5	C035
Brubaker Elementary School	2900 E 42nd St	Des Mc	IA	50317-4010	C024	9	2900 E 42nd St	Des Moines	IA	50317-4010	9	C024
BTI Special Commodities Inc	PO Box 4805	Des Mc	IA	50305-4805	B049	55	4475 NE 3rd St	Des Moines	IA	50313-2302	991	C016
Calvin Community	4210 Hickman Rd	Des Mc	IA	50310-3333	C023	108	4210 Hickman Rd	Des Moines	IA	50310-3333	108	C023
Canteen Vending Svc	539 S 18th St	West D	IA	50265-5506	R011	196	539 S 18th St	West Des Moine	IA	50265-5506	196	R011
Capital Sitework	831 NE Broadway	Des Mc	IA	50313-2434	C016	311	831 NE Broadway Av	Des Moines	IA	50313-2434	311	C016
Carquest Auto Parts	4588 SE Delaware	Ankeny	IA	50021-9303	R001	980	4598 SE Delaware Av	Ankeny	IA	50021-9303	980	R001
Carquest Auto Parts	4602 SE Delaware	Ankeny	IA	50021-9351	R001	22	4602 SE Delaware Av	Ankeny	IA	50021-9351	22	R001
Casey's General Stores Inc	PO Box 3001	Ankeny	IA	50021-8045	B050	14	1 SE Convenience Blv	Ankeny	IA	50021-9437	18	R007
CDS Global	1901 Bell Ave # 19	Des Mc	IA	50315-1087	C080	19	1901 Bell Ave # 19	Des Moines	IA	50315-1087	19	C080
Charles Gabus Ford	4545 Merle Hay Rc	Des Mc	IA	50310-2335	C044	459	4545 Merle Hay Rd	Des Moines	IA	50310-2335	459	C044
Child Serve Ctr	5900 Pioneer Pkw	Johnstc	IA	50131-1569	R002	9	5000 Pioneer Pkwy	Johnston	IA	50131-1569	9	R002
Coca-Cola Bottling Co	PO Box 519	Waukee	IA	50263-0519	B005	199	16200 Hickman Rd	Waukee	IA	50263-8159	1	R001
Coldwell Banker	8825 Northpark Ct	Johnstc	IA	50131-3018	R009	251	8825 Northpark Ct	Johnston	IA	50131-3018	251	R009
Colorfx	PO Box 3538	Des Mc	IA	50323-0538	B001	580	10776 Aurora Ave	Des Moines	IA	50322-2074	782	C057
Community State Bank NA	817 N Ankeny Blvd	Ankeny	IA	50023-1776	C014	171	817 N Ankeny Blvd	Ankeny	IA	50023-1776	171	C014
Compressor Controls Corp	4725 121st St	Des Mc	IA	50323-2316	R029	258	4725 121st St	Des Moines	IA	50323-2316	258	R029
Con-Way Freight	5955 NE 19th St	Des Mc	IA	50313-2505	R004	556	5955 NE 19th St	Des Moines	IA	50313-2505	556	R004
Continental Western Group	PO Box 1594	Des Mc	IA	50306-1594	B650	944	11201 Douglas Ave	Des Moines	IA	50322-3780	19	C057

Tab: "Corp List"

COUNTY	PHONE NUMBE	FAX NUMBER	WEB ADDRESS	LAST NAME	FIRST NA	CONTACT T	CONTACT	EMPLOYEE SI	SALES VOLUME RA	PRIMARY	PRIMARY SIC DESCRI	SECONDARY
Polk	515243	515			Erin	HR Exec	Female	250 to 499	$10 - 20 Million	734902	Janitor Service	734902
Polk	515986	515	www.adesa		Diane	HR Exec	Female	100 to 249	$100 - 500 Million	501204	Automobile Auction	501204
Polk	515266	515	www.adven	per	Gary	HR Exec	Male			799604	Amusement & Them	799601
Polk	515251	515	www.agricr		Bill	HR Exec	Male	100 to 249	$50 - 100 Million	614102	Financing	614102
Polk	515244	515	www.aib.edi		Joan	HR Exec	Female	100 to 249		822101	Schools-Universities	822101
Warren	515961	515	www.alamo-		Angie	HR Exec	Female	100 to 249	$50 - 100 Million	508320	Farm Equipment (Wh	508310
Polk	515280	515	www.alliedir		Susan	HR Exec	Female	1000 to 4999		641112	Insurance	641112
Polk	515967	515			Roz	HR Exec	Female	100 to 249	$5 - 10 Million	805101	Nursing & Convalesc	805101
Polk	515309	515			Gary	HR Exec	Male	100 to 249	$50 - 100 Million	521126	Building Materials	521126
Polk	515278	515	www.americ		Brooke	HR Exec	Female	100 to 249	$20 - 50 Million	571216	Furniture-Dealers-Re	571216
Polk	515221	515	www.america	ter	Kathy	HR Exec	Female	250 to 499	Over $1 Billion	631198	Life Insurance (Unde	631198
Polk	515245	515			Meisha	HR Exec	Female			641112	Insurance	641112
Polk	515265	515	www.aedairy.		Jeremy	HR Exec	Male	250 to 499	$100 - 500 Million	202698	Fluid Milk (Mfrs)	202101
Polk	515246	515			Erin	HR Exec	Female	100 to 249	$20 - 50 Million	641112	Insurance	641112
Polk	515265	515	www.aramark		Tricia	HR Exec	Female	250 to 499	$20 - 50 Million	721306	Uniform Supply Servi	569922
Polk	515278	515	www.aspenat		Heather	HR Exec	Female	100 to 249	$2.5 - 5 Million	799101	Health Clubs Studios	799101
Polk	515243	515	www.augusth		Michal	HR Exec	Female	250 to 499	$50 - 100 Million	274105	Publishers (Mfrs)	274105
Polk	515243	515	www.augusth		Micai	HR Exec	Female	100 to 249	$20 - 50 Million	272102	Publishers-Periodical	272102
Polk	515288	515	www.bakerele		Susan	HR Exec	Female	250 to 499	$50 - 100 Million	173101	Electric Contractors	173101
Polk	515262	515	www.thebake		Kathy	HR Exec	Female	250 to 499	$50 - 100 Million	171114	Mechanical Contract	171103
Polk	515225	515			Amy	HR Exec	Female	100 to 249	$100 - 500 Million	671201	Holding Companies (	602101
Polk	515245	5151	www.bankers		Renee	HR Exec	Female	250 to 499	Over $1 Billion	602102	Trust Companies	509905
Dallas	515999	5151			Tracy	HR Exec	Female			421309	Trucking-Motor Freig	421309
Polk	515265	5152	www.bartonsc		Ed	HR Exec	Male	100 to 249		516837	Solvents (Whls)	516837
Polk	515278	5152	www.johnstor		Maurina	HR Exec	Female	100 to 249		821103	Schools	821103
Polk	515263	5152			Sherri	HR Exec	Female	100 to 249		833104	Cognitive Disability-(	399906
Polk	515270	5152	www.mercydr		Christine	HR Exec	Female	100 to 249	$10 - 20 Million	805101	Nursing & Convalesc	805101
Polk	515967	5159	www.bosselm		Tricia	HR Exec	Female	100 to 249	$50 - 100 Million	554103	Truck Stops & Plazas	554103
Polk	515327	5152	www.briggsco		Geoff	HR Exec	Male	250 to 499	$100 - 500 Million	276104	Manifold Business Fc	275202
Polk	515282	5152	www.broadla		Annette	HR Exec	Female	500 to 999	$50 - 100 Million	806202	Hospitals	801101
Polk	515242	5152			Michelle	HR Exec	Female			811103	Attorneys	811103
Polk	515242	5152	www.dmps.k1		Mike	HR Exec	Male	100 to 249		821103	Schools	821103
Polk	515283	5152	www.btisci.cc		Gary	HR Exec	Male	100 to 249	$10 - 20 Million	421309	Trucking-Motor Freig	421309
Polk	515277	5152	www.calvince		Bill	HR Exec	Male	100 to 249	$2.5 - 5 Million	805904	Retirement Commun	651306
Polk	515221	5152	www.canteer		Kim	HR Exec	Female	100 to 249	$10 - 20 Million	596201	Vending Machines	596201
Polk	515244	5152	www.capitals		Allen	HR Exec	Male	100 to 249	$10 - 20 Million	78204	Landscape Contractc	78204
Polk	515962	5159	www.carques		Amanda	HR Exec	Female	100 to 249	$10 - 20 Million	553111	Automobile Parts &	553111
Polk	515963	5159	www.carques		Amanda	HR Exec	Female	100 to 249	$10 - 20 Million	553111	Automobile Parts &	509998
Polk	515965	5159	www.caseys.		Julia L	HR Exec	Female	10000+	Over $1 Billion	541103	Convenience Stores	541103
Polk	515247	5152	www.cdsfulfil		Nancy	HR Exec	Female	1000 to 4999		738999	Business Services Ne	738999
Polk	515278	5152	www.gabusfc		Dee	HR Exec	Female	100 to 249	$50 - 100 Million	551102	Automobile Dealers-	551102
Polk	515278	5152	www.childser		Jay	HR Exec	Male	250 to 499		836105	Residential Care Hon	836105
Dallas	515987	5152			Judy	HR Exec	Female	100 to 249	$50 - 100 Million	208601	Bottlers (Mfrs)	208601
Polk	515221	641	www.bkegan		Joseph	HR Exec	Male	100 to 249	$10 - 20 Million	653118	Real Estate	653118
Polk	515278	515	www.colorfx.		Dave	HR Exec	Male			275998	Commercial Printing	275303
Polk	515962	515	www.bankcsb		Shan	HR Exec	Female	100 to 249	$500 Million - $1 Bi	602101	Banks	602101
Polk	515278	515	www.cccglobe		Julie	HR Exec	Female	250 to 499	$50 - 100 Million	362598	Relays & Industrial C	362598
Polk	515266	515			Frank	HR Exec	Male	100 to 249	$10 - 20 Million	421309	Trucking-Motor Freig	421309
Polk	515247	515	www.cwgins.		Robert B	HR Exec	Male	500 to 999		641112	Insurance	633101

Tab: "Corp List"

SECONDARY SIC DE	MSA
Janitor Service	Des Moines, IA
Automobile Auctio	Des Moines, IA
Amusement Places	Des Moines, IA
Financing	Des Moines, IA
Schools-Universitie	Des Moines, IA
Farm Equipment (N	Des Moines, IA
Insurance	Des Moines, IA
Nursing & Convale:	Des Moines, IA
Building Materials	Des Moines, IA
Furniture-Dealers-I	Des Moines, IA
Life Insurance (Unc	Des Moines, IA
Insurance	Des Moines, IA
Cheese Processors	Des Moines, IA
Insurance	Des Moines, IA
Uniforms	Des Moines, IA
Health Clubs Studi	Des Moines, IA
Publishers (Mfrs)	Des Moines, IA
Publishers-Periodic	Des Moines, IA
Electric Contractor	Des Moines, IA
Sheet Metal Work	Des Moines, IA
Banks	Des Moines, IA
Importers (Whls)	Des Moines, IA
Trucking-Motor Fr	Des Moines, IA
Solvents (Whls)	Des Moines, IA
Schools	Des Moines, IA
Assembly & Fabric	Des Moines, IA
Nursing & Convale:	Des Moines, IA
Truck Stops & Plaz	Des Moines, IA
Printers (Mfrs)	Des Moines, IA
Physicians & Surge	Des Moines, IA
Attorneys	Des Moines, IA
Schools	Des Moines, IA
Trucking-Motor Fr	Des Moines, IA
Retirement Apartn	Des Moines, IA
Vending Machines	Des Moines, IA
Landscape Contrac	Des Moines, IA
Automobile Parts I	Des Moines, IA
Distribution Center	Des Moines, IA
Convenience Store	Des Moines, IA
Business Services F	Des Moines, IA
Automobile Dealer	Des Moines, IA
Residential Care Ho	Des Moines, IA
Bottlers (Mfrs)	Des Moines, IA
Real Estate	Des Moines, IA
Printers (Mfrs)	Des Moines, IA
Banks	Des Moines, IA
Relays & Industrial	Des Moines, IA
Trucking-Motor Fr	Des Moines, IA
Insurance-Property	Des Moines, IA

EXHIBIT F

Laurie Dondelinger

From:	Laurie Dondelinger [ldondelinger@kohlls.com]
Sent:	Wednesday, March 03, 2010 2:34 PM
To:	'Pam Chelesvig'
Cc:	'Marty Feltner'; 'Traci Lutt'; 'dkohll@kohlls.com'; 'Carol Wickwire'
Subject:	RE: blast fax update

4,760 faxes just went out (estimated at $150 if ALL go through – we pay $0.04 per fax that goes through).

Please let me know the response you get. thanks

Laurie Dondelinger

From: Pam Chelesvig [mailto:pchelesvig@kohlls.com]
Sent: Wednesday, March 03, 2010 2:03 PM
To: 'Laurie Dondelinger'
Cc: 'Marty Feltner'; 'Traci Lutt'; dkohll@kohlls.com; 'Carol Wickwire'
Subject: blast fax update

Hi Laurie,

I just went desk to desk in the call center. Everyone is aware, had printed out and highlighted the phone call protocol on their cube walls and they are ready and waiting for the phone to ring. GREAT!
So let'r rip!

Good job and thanks for your efforts!
Pam

Pam Chelesvig
Director of Business Development
Kohll's Pharmacy and Homecare
12739 Q Street
Omaha, Nebraska 68137-3211
402-306-4006
pchelesvig@kohlls.com

EXHIBIT G

WestFax
smart communication

REMIT TO:

5690 DTC BLVD. SUITE 670
GREENWOOD VILLAGE, CO 80111

TEL: (303) 299-9329
FAX: (303) 299-9309

BILL TO:

Kohli's Pharmacy & Homecare
Attn: Laurie Dondelinger
12759 Q St.
Omaha, NE 68137

Invoice

ACCOUNT NUMBER	DATE	INVOICE #
3024	3/6/2010	957606

Terms
Net 30

ITEM DESCRIPTION	QUANTITY	AMOUNT
Broadcast Fax Per Page Normal KPH - Date: 3/3/2010 Job: BFX-02069666 Name: corp flu - corp fax list Billing Code: laurie	4142.0000	$165.68

Please Include your invoice number on your checks.

TOTAL **165.68**

EXHIBIT H

BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	63068		1 Jack	Reynoldson	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	77370		1 Peter	De Stein	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	81564		1 Mary Ellen	Niles	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	81548		1 Thomas	Eddy	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	21984		1 Jennifer	York	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	77385		1 Joe	Garza	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	63098	Redacted	1 Claudia J	Colalillo	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	84763		1 Nancy	Mc Donald	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	63023		1 Ted	Schamer	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	63068		1 Lori	Balha	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	61845		1 Beth	Heflin	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	84785		1 Liz	Osman	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	31266		1 Martha	Youni	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	71254		1 Dan	Dilts	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	84754		1 Alan	Rosenbaum	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	70856		1 Jean	Cannarella	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	84729		1 Patrick	Mcgarrigle	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	77353		1 K	Lashburgh	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	77354		1 Kathy	Wandinger	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	31263		1 Timothy P	Moran	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	31451		1 Gisela	Clement	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	51526		1 Summer	Reed	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	40273		1 Michael	White	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	31489		1 Pat	Marx	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	63090		1 Debra	Varnum	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	70834		1 Lisa	Valantin	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	70897	Redacted	1 Kay	Bronakowski	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	84724		1 Steve	Suchy	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	40233		1 Brad	Garlock	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	77363		1 Carol	Larsson	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	63656		1 Jeff	Antonelli	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	63077		1 Doretta	Moracci	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	31289		1 Katherine J	Andreasen	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	31425		1 Darlene	Incaudo	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	70821		1 Vicky	Piper	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	70836		1 Cheryl	Clark	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	31266		1 Maria	Perez	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	63076		1 Steve	Bask	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	84755		1 Vince	Piat	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	61822		1 Brian	Burns	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	70874		1 Vera	Dickson	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	63087		1 Laura	Pogwied	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	81545		1 Craig	Banner	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:31PM	31244	Redacted	1 Kathleen	Bell	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	31477		1 Kathy	Stewart	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	7735		1 Diane	Vlcek	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6363		1 Jean	Altemueller	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	7087		1 Kathleen	Sullivan	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3146		1 Dan	Bauer	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	5152		1 Annette	Doman	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8474		1 Steve	Doughtry	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	4025		1 Lynnette	Jennings	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8154		1 Peggie	Wells	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:33PM	6308		1 Jayra	Mallari	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	4026		1 Maryjane	Herron	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6303		1 Marjorie	Nevin	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3145		1 Erin	Schottmueller	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	8479		1 Vicki	Lutsky	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	8152		1 Dick	Wright	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	8152		1 Cheryl	Everett	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3123	Redacted	1 Gail	Eubanks	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	7732		1 Juan	Kardel	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	3124		1 Trevor	Darby	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6307		1 Lori	Buckley	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	3122		1 Frances	Santiago	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:47PM	7088		1 Mary C	Cass	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6308		1 Bob	Scarlett	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6185		1 Shelly	Myers	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4024		1 Andy	Allowey	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6308		1 Brenda	Gaylord	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6369		1 Heidi	Oberle	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	6183		1 Vicki	Grigsby	HR Exec	Sent

BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	219	1	Lisa	Ramtarak	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	262	1	Peter	Gaissal	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	847	1	Barbara	Ostrom	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	402	1	Nancy	Mc Intosh	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	708	1	Debi	Carnahan	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	847	1	Jane	Pellettieri	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	815	1	Judy	Pedersen	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	815	1	Donna	Conway	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	312	1	John	Potempa	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	402	1	Alandah	Austin	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	708	1	Emil	Cribari	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	847	1	Connie	Boruchi	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	515	1	Tracy	Murphy	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	312	1	Michelle	Laplante	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	773	1	Barbara	Kaszuk	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	6304	1	Jean	Vetrovec	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8472	1	Mike	Milewski	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	2193	1	Byron	Clay	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4023	1	Marie	Lasale	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8473	1	Don	Mc Carthy	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3125	1	Mary	Bauer	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6304	1	Craig	Von Vehren	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8477	1	Michael	Komenda	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	2199	1	William	Murray	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8476	1	Shannon	Moore	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8475	1	Sherry	Bagne	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8477	1	Stephanie	Borio	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	7123	1	Mike	Wallner	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	5734	1	Kathy	Rowner	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	8154	1	Mary Beth	Attaway	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	7735	1	Carmen	Mendoza	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	5732	1	Kevin	Carpenter	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	5152	1	Kim	Miles	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	7736	1	Greg	Watts	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	7123	1	Angie	Rodenburg	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4023	1	Theresa	Hewitt	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8473	1	Frank	Colosi	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3146	1	Shirley A	Woolery	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	7737	1	Margaret	Johnson	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3149	1	Steven M	Barney	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4024	1	Fran	O'Neil	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6308	1	James	Oesterrich	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6304	1	Lola	Falconer	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	7739	1	Sandra	Youngren	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	4024	1	Mandy	Ishibashi	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	6305	1	Sara	Skrabal	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6309	1	Cheryl	Palmer	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	3147	1	Larry	Lee	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6369	1	Kevin	Keltner	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6305	1	April	Elders	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	8476	1	Lauren	Smith	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3123	1	Kathy	Joiner	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	4026	1	Kathy	Hicks	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	4024	1	Chad	Gumbart	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6308	1	Scott	Holsom	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6305	1	Barbara	Warda	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6307	1	Marc	Has	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4024	1	Judy	Young	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4023	1	Jan	Klaus	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	7083	1	Gloria	Linares	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3122	1	Lynn	Sorkin	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:17PM	6308	1	Dwayne	Howard	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:33PM	6308	1	Jose	Oregon	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	6186	1	Geri	Godelman	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4025	1	Gaile	Hodges	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4023	1	Tiffany	Seevers	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3144	1	Linda	French	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	3125	1	Julie L	Goodman	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	8479	1	Ed	Carey	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	8478	1	Cheryl	Matthews	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:29PM	4023	1	Bob	Shultz	HR Exec	Sent
BFX-02069666	corp flu - corp fax list	laurie	Mar 3 2010 10:30PM	3142	1	Mary	Louis	HR Exec	Sent

EXHIBIT I

***Whiting Corp. v. SunGard Corbel, Inc.*, 2005 TCPA Rep. 1413, 2005 WL 5569575 (Ill. Cir. Nov. 9, 2005)**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

WHITING CORPORATION, on behalf of itself and all others similarly situated, Plaintiff,

v.

SUNGARD CORBEL, INC., Defendant.

Judge Patrick E. McGann

No. 03 CH 21135

Nov. 9, 2005

Cal. 6

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

RESULT:

Motion for class certification granted.

SYNOPSIS:

Business which received unsolicited fax advertisement brought class action against sender under TCPA, and sought class certification. The parties did not dispute numerosity, and the court held that common questions of fact or law common to the class predominate over any questions affecting only individual members; the class representative and counsel will fairly and adequately protect the interest of the class; a class action is an appropriate method for the fair and efficient adjudication of the controversy.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

n/a

APPEARANCES:

JUDGES:

Patrick E. McGann, J.

HOLDINGS:

[☞1] **Class Certification**

Fact that daughter of an employee of the class representative was also an attorney who had received fees from class counsel for prior referrals of TCPA cases, did not present a conflict so to prevent class certification, however the court would order that daughter would not receive any fees from this case.

[☞2] **Class Certification**

It will not require individualized inquiry into identify of relationship of each class member where advertiser sent at least 9,014 facsimiles to entities whose contact information was purchased from a third-party.

[☞3] **Class Certification**

Where a fax advertiser sends faxes to a list of unrelated fax numbers obtained from a third-party, it may create a presumption that the facsimiles were not legal.

[☞4] **Express Invitation or Permission (proof)**

A basic premise of the TCPA is that a advertiser who decides to market goods or services through this medium, must have express permission or at the very least a reasonable expectation that the recipient would accept the transmission. Hence, it would appear a reasonably prudent business person would maintain such information. Their failure to so act does not inure to such an advertiser's benefit.

[☞5] **Telephone Facsimile Machine (definition)**

The receipt of the fax on a fax machine which prints the message is not necessarily an element of the federal statute.

[☞6] **Class Certification**

Evidence of receipt may not be necessary where the evidence suggests that the sender sent multiple messages contemporaneously by use of automated equipment.

[☞7] **Statute of Limitations**

The 4 year statute of limitations in §1658 applies to the TCPA.

[☞8] **Class Certification**

While on its face what appears to be an enormous disparity between the actual damages for unsolicited faxes and the damages available under the TCPA to the class, to make the leap of logic that such a disparity ipso facto precludes certification is extremely premature and is based to a great deal on conjecture. Denying class certification solely on this disparity also gives a fax advertiser little incentive to conform its conduct to legal requirements.

[☞9] **Class Certification**

Here it appears that forcing the class members to pursue their claims individually will make their claims impractical as they will be required to hire counsel in order to receive an award of $500.

OPINION:

MEMORANDUM OPINION AND ORDER

[***1**] Plaintiff, Whiting Corporation ("Whiting") on behalf of itself and all others similarly situated, moves, pursuant to Section 2-801 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, to certify a class of "all persons and entities who received facsimile messages of material advertising the commercial availability of any property, goods or services by SunGard Corbel and with respect to whom SunGard Corbel cannot provide evidence of prior express permission for the sending of such faxes, and which were sent to telephone numbers on or after a date four years prior to the filing of this action. Defendant, SunGard Corbel ("SunGard") objects to class certification with respect to three of Section 2-801's requirements, the requirement that there be "questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members", "that the representative party will fairly and adequately protect the interests of the class" and the requirement that the class action [***2**] be "an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801(2-4).

I. FACTS RELEVANT TO THE MOTION

SunGard is a provider of software and services for the employee benefits industry. SunGard's employee benefits software is used by third-party administrators and plan sponsors. SunGard also provides live and web-based workshops, education seminars and training on employee benefits related topics. SunGard maintains customer databases consisting of entities with whom SunGard has transacted in the past, and entities that sent an inquiry or request for information to SunGard. Since 1999, SunGard has transmitted thousands of faxes to thousands of entities across the country. SunGard's database contains over 38,600 entities. SunGard contends that these entities provided SunGard permission to send faxes. This database is constantly and consistently being updated and supplemented.

In addition, SunGard sent 9,014 faxes to 4,387 entities that are not in its customer database. (the "Third Party List") Their fax information was compiled from a list purchased from third parties. This Third Party List is kept in a separate static database and is not merged with SunGard's customer database.

On July 22, 2003, Whiting received a one page fax advertising two HIPPA Privacy Compliance seminars. This fax was transmitted to entities that sponsored or administered self-funded plans. Whiting's fax information appeared on the Third Party List and did not overlap with SunGard's customer database.

The Plaintiff seeks recovery under the Telephone Consumer Protection Act, 47 U.S.C. §227 (b)(1)(C). ("TCPA") According to the TCPA, it is restricted "to use any [*3] telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine..." An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. §227 (a)(4).

II. LEGAL STANDARD

Class certification is a matter under the broad discretion of the trial court. *McCabe v. Burgess*, 75 Ill.2d 457, 464 (1979). The class action statute sets out the requirements for maintenance of a class action:

"Prerequisites for the maintenance of a class action.

(a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801

The consumer class action is an inviting procedural device to address frauds that cause small damages to large groups. *Gordon v. Boden*, 224 Ill. App. 3d 195, 204 (1991). [FN1]

FN1. [These claims are] the ones in which the rationale for the procedure is most compelling--individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation. In re Rhone Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

In cases where there are a substantial number of potential claimants and the individual amounts of their claims are relatively small, Illinois courts have tended to permit the claims to proceed as a class action. Id. at 200.

[*4] III. DISCUSSION

1. NUMEROSITY

The parties do not dispute that the numerosity requirement is met. The numerosity portion of the Illinois statute, although the easiest factor to find, is not subject to arithmetic certainty and depends on the facts and circumstances of each case. *In Wood River Area Development Corp. v. Germania Federal Savings and Loan*, 198 Ill. App. 3d 445, 450 (5th Dist. 1990), the Appellate Court noted that courts, either federal or state, have not established a "magic number" which guarantees certification. The court did, however, point with authority to a quote from Miller, An Overview of Federal Class Actions: Past, Present and Future, Federal Judicial Center, at 22 (1977), which stated:

If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity is probably lacking; if the class has between twenty-five and forty, there is no automatic rule and other factors...become relevant.

As Plaintiff points out and Defendant does not dispute, the Proposed Class here potentially comprises at least 4,387 fax recipients. The Court finds that this satisfies the requirements of 2-801(1).

2. ADEQUACY OF REPRESENTATION

The Defendant argues that the Plaintiff is not an appropriate class representative. The Defendant contends that a potential for abuse and conflicting interests exists because Frederick Teggelaar, the Director of Risk & Administration at Whiting, and person responsible for reviewing Whiting's faxes and relaying unsolicited faxes to Whiting's counsel is the father of Michelle Teggelaar, a partner at the law firm of Edelman, Combs, Latturner & Whiting, LLC. Ms. Teggelaar evidently referred Whiting to its current counsel, Keith Keogh. Mr. Keogh is a former associate of Edelman, Combs, Latturner & [***5**] Whiting, LLC and met Ms. Teggelaar there. In the past, Ms. Teggelaar has received compensation resulting from the settlement of other Whiting TCPA cases which she referred to Mr. Keogh. Whiting has filed 11 TCPA cases with Mr. Keogh as counsel. The Defendant posits that Mr. Teggelaar may be more interested in securing compensation for his daughter than representing the proposed interests of absent class members. Defendant claims that class certification should be denied because of the personal and business relationship between the attorneys and the class representative.

To determine adequacy of representation, the trial judge must examine two issues:

(1) will representation by the proposed class representative protect the absent members of the class who must be afforded due process? *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 339 (1977); and (2) does the attorney have the skill, qualifications and experience to conduct the proposed litigation? Steinberg, 69 Ill. 2d at 339.

Unlike the requirement in Rule 23 of the Federal Rules of Civil Procedure that the claim of the proposed class representative be typical of those of the class, Illinois has adopted a more liberal approach. *Carrao v. Health Care Service Corp.*, 118 Ill. App. 3d 417 (1st Dist. 1983). Instead, Illinois requires that the representative fairly, adequately and efficiently represent absent class members. *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1st Dist. 1991).

This requirement has been defined as a showing that the interest of the proposed class representatives are not antagonistic to those of the absent class members. Thus, issues such as slight variations in the claim, *Purcell v. Wardrope Chtd. v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1078 (1st Dist. 1975), or individualized affirmative defenses, *Wenhold v. AT&T*, 142 Ill. App. 3d 612, 619 (1st Dist. 1986) will not defeat [***6**] certification. However, in cases where there is evidence of antagonism or collusion, *Hansberg v. Lee* 311 U.S. 32 (1940), between the proposed representative and absent class members or a close connection with the lawyer representing the proposed class, *Barliant v. Follett Corporation*, 74 Ill. 2d 266 (1978), class certification should be scrutinized.

Numerous cases cite policy reasons for denial of class certification, due to the possible conflict of interest between the putative class representative and the putative class attorney. For example, courts fear that a class representative who is closely associated with the class attorney could be more likely to settle in a less than favorable manner to the class members. *See Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974); *see also Sussman v. Lincoln American Corp.*,561 F.2d 86 (7th Cir. 1977). There is also the risk of champerty when a putative class representative has a close relationship with their attorney. *See Sussman*, 561 F.2d at 91. Finally, even the mere appearance of impropriety between a putative class representative and the class attorney has resulted in denial of class certification. *Kramer v. Scientific*

Control Corp., 534 F.2d 1085 (3rd Cir. 1976).

Here, the Defendant relies on this Court's decision in *Bernstein v. American Family Insurance Company*, No. 02CH6905 (Ill. Cir. Ct. July 6, 2005). In Bernstein, this Court denied class certification because the class representative selected the Edelman firm as counsel in four other TCPA cases. No. 02CH6905, at *3. This Court reasoned that the cases were brought "not as individual claims by an aggrieved owner of a facsimile machine and telephone line, but as a skilled litigant who has culled through the numerous invaders of his privacy to select only those who have collectability." Bernstein, No. 02CH6905, at *3. Furthermore, Bernstein, as class representative, was in a position [***7**] settle the case in a way that would maintain his business relationship with the firm, but result in a "less than ideal" outcome for the class members. *Id.* Finally, Mr. Bernstein and the selected law firm had acted as co-counsel on a resolved and at least one pending class action claim. The holding by this Court hinged on the Court's determination that its fiduciary duty to the absent class members might not be properly discharged because of the business and litigation relationships present.

There is nothing to distinguish this Plaintiff from others who for very prudent reasons retain the same counsel for multiple cases. This situation is distinguishable from that presented in Bernstein, supra., where the attorney and putative class representative had previous and ongoing professional business relationships that, in this Court's opinion, create conditions which might impact adversely on the absent class members.

The attorney, Keith Keogh does not appear to have a relationship with Whiting and its employees which would create a risk of champerty.

[☞1] It is only necessary that the representative not seek relief antagonistic to the interests of other potential class members. *Purcell & Wardrope Chartered*, 175 Ill. App. 3d at 1078. Defendant has not shown that Whiting is seeking relief antagonistic to other potential class members. The Plaintiff also represents that any settlement agreement in this case will be approved by Mr. Jeffrey Kahn, the President of Whiting. While this fact would appear to allay any concerns, the reality of the situation strongly suggest that Mr. Teggelaar will have significant impact on the decision making process.

This is a large international corporation. Mr. Kahn, presumably, has multiple and varied responsibilities. Of necessity he must rely on the input of trusted employees to assist in the decision making process. While the receipt of unsolicited telephone facsimile [***8**] delivered advertising may be annoying, it is not clearly the type of legal issue that would be worth of significant independent study or analysis by Mr. Kahn. Consequently, Mr. Teggelaar's input would be of great significance.

Moreover, there is no evidence that Mr. Keogh and Ms. Teggelaar have complied with the applicable Rules of Professional Conduct in this area. Therefore, the Court will exercise its discretion to deny Ms. Teggelaar any referral fees resulting from the settlement of this case. This eliminates any potential conflict between Whiting and absent class members.

As to the issue of adequate representation by counsel, in addition to the lack of any conflict or close relationship between counsel and the proposed representative, the Court is satisfied that counsel's experience in these matters will guarantee that the interests of absent class members are adequately represented.

3. COMMON QUESTIONS OF FACT OR LAW

Whiting asserts that the common question is whether the Defendant's act of sending the fax advertisement violated the TCPA. It claims that because the Defendant acted identically to all members of the class, there is a common question of law and fact. SunGard claims that there are three issues which even if proven by Whiting will not establish their existence for any other putative class member. These are the existence of a established business relationship, the receipt of the facsimile on a fax machine and showing that the claim is not time barred by the applicable statute in a class member's state of residence. SunGard claims that these are not common questions as there is a need to prove them for each individual class member.

[***9**] The decisions denying class certification of TCPA claims because the issue of whether the recipient gave "express invitation or permission," necessarily requires an individualized inquiry into the circumstances of each message, *e. g., Foreman v. Data Transfer, Inc.*, 164 F.R.D. 400 (ED, Pa. 1995) and *Kenro, Inc. v. Fax Daily Inc.*, 962 F. Supp. 1162 (SD, Ind. 1997), belie a misunderstanding of telephone facsimile advertising as alleged in the complaint and materials supporting the instant Motion. Those courts seem to resolve the matter based upon a belief that this form of messaging is occasional or sporadic and not an organized program. [2] To the contrary, the facts before this Court yield that the Defendant sent at least 9,014 facsimiles to entities whose contact information was purchased from a third-party. The manner in which the Defendant identified these recipients will not require individualized inquiry. The Defendant contends that the Third Party List overlaps with the lists of entities in its database who allegedly have established business relationships with the Defendant. The Defendant has not stated what the extent of this overlap may be, but if there is duplicity those entities should be easily identifiable and thus culled from the class. [3] Indeed, the Defendant's conduct may create a presumption that the facsimiles were not legal. [FN2]

FN2. A presumption is an inference which common sense draws from the known course of events. *McElroy v Force*, 38 Ill. 2d 528, 531 (1967).

The Defendant also asserts that its marketing data base is constantly changing. Thus, some of the putative class members on the purchased list may have been customers at the time the facsimile was sent, but over the course of years were deleted for numerous reasons. The Plaintiffs suggest, quite appropriately that this information may be gleaned from billing or other records. [4] In addition, this argument ignores the basic premise of the TCPA scheme. Namely that a party who decides to market goods or services through this [***10**] medium, must have express permission or at the very least a reasonable expectation that the recipient would accept the transmission. Hence, it would appear a reasonably prudent business person would maintain such information. Their failure to so act does not inure to its benefit.

The Defendant's allegation that it has an established business relationship with Allied, one of Whiting's third party benefits administrators, is irrelevant to the inquiry of an established business relationship with Whiting.

[5] It appears to this Court that the receipt of the fax on a fax machine which prints the message is not necessarily an element of the federal statute. The provision requires that a fax machine be used to send an unsolicited advertisement to a telephone fax machine. A requirement of actual receipt by the plaintiff is arguably not apparent. It is important to note that the TCPA furthers two important governmental interests. The first is preventing the transfer of advertising costs from the merchandiser to the customer. The second is the adverse effect on commerce caused by the unwanted message occupying the telephone lines and equipment of the consumer. While the automatic printing of the message may not be required, some evidence of receipt must be shown otherwise the purpose of the Congress would be frustrated. [6] However, evidence of receipt may not be necessary where the evidence suggests that the sender sent multiple messages contemporaneously by use of automated equipment.

The TCPA specifically prohibits those telephone facsimile messages which are sent without the recipients "prior express permission or consent."[FN3] This element, even if it is found that the other issues do need to be proven by the class members, would not defeat the commonality of the question, has the Defendant violated the TCPA. In a class [***11**] action, the successful adjudication of the Plaintiff's claim will establish the other class members' right to recover. *Society of St. Francis v. Dulman*, 98 Ill. App. 3d 16, 18 (1981) Where the defendant is alleged to have acted wrongfully in the same basic manner as to an entire class, common class questions dominate the case. *Martin v. Heinold Commodities, Inc.*, 139 Ill.App.3d 1049, 1060 (1985) Here, the allegation is that the identical action by the Defendant of using a fax machine to send unsolicited advertisements is wrongful to all class members. The process by which the class members prove that the fax they received was unsolicited establishes membership in the class. This proof identifies the class, but does not go to the commonality of the question.

FN4. 47 U.S.C. §227(b)(3).

The Plaintiff has requested that the class be defined by those who were sent an advertising fax by Defendant, and with respect to whom Defendant cannot provide evidence of consent or a prior business relationship. By certifying this class, this Court is not, as claimed by the Defendant, reaching a finding on the merits of the underlying cause of action, but merely setting the boundaries of the class. It does appear to this Court that the burden of proving the lack of an established business relationship should correctly fall on the shoulders of the plaintiff as an element of its TCPA claim. The definition of the certified class will be amended to reflect this.

In regards to the running of the statute of limitations on individual class members claims, the Defendant alleges that each individual class member must show that their claim has not been time barred by the applicable statute in its state of residence and the Plaintiff must show that differing laws can be grouped into subclasses.

The Defendant relies on *Chair King, Inc. v. GTE Mobilnet of Houston.*, 135 S.W.3d 365 (Tex.App. 2004) for the determination that TCPA claims are equivalent to [***12**] tort claims and therefore state statute of limitations for tort claims must apply and not the federal catch-all four year limitation in 28 U.S.C. §1658(a). This ruling is based on the TCPA language, that an action may be brought under the TCPA "if otherwise permitted by the laws or rules of court of a state" [FN4] which, according to the Texas court, does not permit an action to be brought in state court if it would be time-barred by that state's statute of limitations. The Defendant then applies Illinois law to the Plaintiff's claim against SunGard, a Florida corporation. As Illinois has no connection to non-Illinois class members claims therefore 735 ILCS 5/13-210 requires that the Court look to the statute of limitation in the state where the cause of action has arisen. The Defendant alleges that determining the limitations would be a difficult and individualized task as the Plaintiff's class definition refers to a six year period and thousands of faxes sent. In addition, Defendant claims that determining which states have opted out of providing a private TCPA cause of action also prevents certification.

FN4. 47 U.S.C. §227(b)(3).

In response, Plaintiff cites to a New Jersey Appellate Court case which applies the Supreme Court decision of *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) [FN5].

FN5. This decision was decided 3 days prior to the Chair King decision and was not mentioned by the Texas court. The Chair King decision was also certified for appeal on March 11, 2005.

The U.S. Supreme Court constructed §1658 as follows:

"a cause of action "aris[es] under an Act of Congress enacted" after December 1, 1990--and therefore is governed by § 1658's 4-year statute of limitations--if the plaintiff's claim against the defendant was made possible by a post-1990 enactment. *Jones*, 541 U.S. at 382.

And reasoned that:

[The] construction best serves Congress' interest in alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations while at the same [***13**] time protecting settled interests. It spares federal judges and litigants the need to identify the appropriate state statute of limitations to apply to new claims but leaves in place the "borrowed" limitations periods for preexisting causes of action, with respect to which the difficult work already has been done. *Id.*

The New Jersey Appellate Court applied the Jones ruling to TCPA actions in *Zelma v. Konikow*, 379 N.J. Super. 480 (2005).

We conclude that Jones requires a narrow reading of the phrase "except as otherwise provided by law" included in § 1658 and a similarly narrow reading of language of "exception" included in statutes like the TCPA that were enacted after § 1658. Consistent with Jones, we hesitate to read general language of exception to infer that Congress intended to create new "voids" in federal law governing limitation periods and reintroduce the difficulties and confusion that § 1658 was designed to eliminate. Absent a clear indication of an alternate limitation period, language of exception in post-1990 federal enactments should not be read as intended to override the limitation period provided in § 1658. Any other approach would undercut the remedial purposes of § 1658 in favor of application of a period of limitations that "is, at best, only a rough approximation" of a state's view of a proper balance of the interests furthered by limitation periods. *Zelma*, 379 N.J. Super. at 485.

[7] It is this Court's opinion that *Zelma* is the correct interpretation of the application of §1658 to the TCPA. The legislative purpose of this section was to facilitate federal litigation and not to complicate it.

As to the Defendant's allegation that the fact that some states have opted out of the TCPA will cause individual issues not appropriate for class action, the Defendant has not indicated any such states and, if such exist, the identification of their residents would be easily accomplished.

[*14] 4. APPROPRIATE METHOD FOR FAIR AND EFFICIENT ADJUDICATION

The Defendant asserts that a class action certification does not allow for an appropriate or fair adjudication. The TCPA created a remedy that is fair to the recipient and sender and a class action fund that would be sufficient to cover a fraction of the thousands of faxes, could far exceed the type of fines that the FCC has issued to the most egregious, intentional, repeat violators of the TCPA. Congress did not intend for companies like SunGard to be subject to multi million dollar liabilities and the statutory damages were set at an artificially high level for the very purpose of making individual actions viable.

To determine if class action is the appropriate method for fair and efficient adjudication, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain. *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1991). It is this Court's opinion that the economies of time, effort and expense, and uniformity will be served by certifying the Plaintiff's class. The predominate question of the Defendant's violation of the TCPA will be resolved in one forum and thus promote efficiency and uniformity. Litigating the individual lawsuits in the present case would be a waste of judicial resources, and addressing the common issues in one action would aid judicial administration. *Clark v. TAP Pharm. Prods., Inc.*, 343 Ill. App. 3d 538, 552 (2003)

As to the Defendant's concerns about the propriety of the amount of damages and the amount of consumer protection afforded by the decision to grant such damages, the **[*15]** Court finds helpful and informative the following text from the California Appellate Court:

"[T]he TCPA damages provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements, but also to address and deter the overall public harm caused by such conduct. ...

[T]he TCPA was meant to [(1)] 'take into account the difficult[y] [of] quantify[ing] [the] business interruption costs imposed upon recipients of unsolicited fax advertisements, [(2)] effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of "junk faxes," and [(3)] "provide adequate incentive for an individual plaintiff to bring suit on his own behalf." ' ...

[S]tatutory damages designed to address such 'public wrongs' need not be 'confined or proportioned to [actual] loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury ...

"... Congress identified two legitimate public harms addressed by the TCPA's ban on junk faxes: (1) unsolicited fax advertisements can substantially interfere with a business or residence because fax machines generally can handle only one message at a time, at the exclusion of other messages; and (2) junk faxes shift nearly all of the advertiser's printing costs to the recipient of the advertisement... [T]he TCPA's $ 500 minimum damages provision, when measured against the overall harms of unsolicited fax advertising and the public interest in deterring such conduct, is not so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.' " (*Texas v. American Blastfax, Inc., supra*, 121 F. Supp. 2d at pp. 1090-1091.)

As another federal court has stated: "[I]n mathematical terms, a $500 penalty for violation of the TCPA is not so high in relation to actual damages as to violate the Due Process clause. ... [E]ven if the actual monetary costs imposed by advertisers upon the recipients of unsolicited fax advertisements [are] small when compared to the $500 minimum penalty for such conduct, that penalty is not so 'severe and oppressive' as to run afoul of the Due Process clause." (*Kenro, supra*, 962 F. Supp. at pp. 1166-1167; *accord, ESI Ergonomic Solutions v. United Artists* (2002) [***16**] 203 Ariz. 94, 100 [50 P.3d 844, 850] (ESI Ergonomic Solutions) ["penalty is not so disproportionate to actual damages as to violate due process"].) *Kaufman v. ACS Systems, Inc.*, 110 Cal. App. 4th 886, 922-923 (Cal. Ct. App., 2003)

There is the shadow of allegedly large devastating verdicts that bear little relation to the actual damages [FN6] resulting from a technical violation of the statute. This argument first found purchase in *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (SD NY. 1972). There the court declined to certify a class of potentially 130,000 consumers who could recover the $100 statutory penalty for violation of the truth in lending laws. The court determined liability could reach $13 million. [FN7] The court found that the Congress in assessing the statutory penalty and allowing payment of attorneys' fees was designed to promote individual and not class litigation for violation of these statutes. This absolute prohibition for class action. litigation of these claims was rejected by the Seventh Circuit in *Haynes v. Logan Furniture Mart Inc.*, 503 F2d 1161 (7th Cir. 1974). The class in *Haynes* was admittedly much smaller [FN8] but the court reasoned that the dual purpose of the truth in lending scheme was not only to encourage law suits by individuals but also compliance with the law. The court showed little sympathy for a creditor who disregarded legal obligations and was called to answer in a class action claim. The court instead adopted a case by case approach focusing on the size of the potential class and the actual damages caused by the wrongdoing. No Illinois case has considered this issue.

FN6. Cost of paper, toner and telephone line or facsimile usage or down time.

FN7. This statute was subsequently amended by Congressional action to limit class action recovery in such cases to $100,000.

FN8. 2,500 versus 130,000.

[***17**] [☞8] As noted the potential class is 4,387 entities that received 9,014 illegal facsimile messages. The actual loss is difficult to measure but pleadings in related cases have established the actual cost of receiving a message at twenty cents. This results in a potential claim of $18,028.00. The recovery under the TCPA is potentially $4.5 million dollars. On its face this appears to be an enormous disparity. However, to make the leap of logic that such a disparity *ipso facto* precludes certification is extremely premature and is based to a great deal on

conjecture. Basing a ruling solely on the disparity also gives the Defendant little incentive to conform its conduct to legal requirements.

As to the Defendant's argument that the small claims court is a fair and appropriate alternative to class action. A "controlling factor in many cases is that the class action is the only practical means for class members to receive redress, particularly where the claims are small." *Gordon*, 224 Ill. App. 3d at 203-204. "When brought by plaintiffs who have no other avenue of legal redress, the consumer class action provides restitution to the injured and deterrence to the wrongdoer." *Id.* at 204. [9] Here it appears that forcing the class members to pursue their claims individually will make their claims impractical as they will be required to hire counsel in order to receive an award of $500.

This result would seriously undermine the goal of the TCPA scheme. The disparity issue arises out of a concern great pressure will be placed on defendants to settle such claims in order to avoid financial ruin. *See In re Rhone Poulenc Rorer*, 51 F. 3d 1293, 1299-1300 (7th Cir. 1995). Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973). However, the four arguments that support this theory, class actions are not triable, defendants exposure to valid small claims is increased, weak but large claims coerce compromise and class actions inherently coerce settlements, are [***18**] entirely contradictory and not supported by empirical evidence. *See* Silver, *We're Scared to Death: Class Certification and Blackmail*, 78 N.Y.U.L. Rev 1357 (2003). These arguments also ignore the fact that the Defendant, if the allegations are proven, broke the law.

Here, the claims can easily be tried. The value of the claims while certain is readily ascertainable and individually relatively small in number and amount. In addition, it appears the Court has the inherent authority under its power of remitturer to reduce the aggregate amount of the award to avoid the feared consequences, while enforcing the stated goal of the statutory scheme. *Parker v. Time Warner Entertainment Company, L.P.*, 331 F3d 13 (2nd Cir. 2003), Newman, J., concurring at pp 37-47.

IT IS HEREBY ORDERED

1. Plaintiff's Motion for Class Certification is GRANTED for the cause of action based on violation of the TCPA.

2. The Court certifies the following class:

"all persons and entities who received facsimile messages of material advertising the commercial availability of any property, goods or services by SunGard Corbel and with respect to whom there is no evidence of prior express permission for the sending of such faxes, and which were sent to telephone numbers on or after a date four years prior to the filing of this action.

Entered: Nov. _____, 2005.

Judge Patrick E. McGann

Judge 1510

# # #

Printed on Tuesday, March 04, 2008.

EXHIBIT J

Supreme Court of Virginia.

JAYNES v. COMMONWEALTH

Jeremy JAYNES v. COMMONWEALTH of Virginia.

Record No. 062388.

– February 29, 2008

Present: HASSELL, C.J., KOONTZ, KINSER, LEMONS, and AGEE, JJ., and RUSSELL and LACY, S.JJ.

Thomas M. Wolf, Richmond (David A. Oblon, Arlington; Joseph M. Rainsbury; LeClair Ryan, Roanoke; Albo & Oblon, Arlington, on briefs), for appellant.William E. Thro, State Solicitor General (Robert F. McDonnell, Attorney General; Stephen R. McCullough, Deputy State Solicitor General; William C. Mims, Chief Deputy Attorney General; Lisa M. Hicks-Thomas, Deputy Attorney General; Samuel E. Fishel, IV, Senior Assistant Attorney General; Russell E. McGuire, Assistant Attorney General, on brief), for appellee.American Civil Liberties Union of Virginia, Inc. and Electronic Frontier Foundation (Rebecca K. Glenberg, Richmond, on brief), amici curiae, in support of appellant.The Rutherford Institute (John W. Whitehead, Charlottesville; Douglas R. McKusick; L. Ilaine Upton, on brief), amicus curiae, in support of appellant.United State Internet Service Provider Association (Jennifer C. Archie; Abid R. Qureshi; Latham & Watkins, Washington, DC, on brief), amicus curiae, in support of appellee.

Jeremy Jaynes appeals from the judgment of the Court of Appeals which affirmed his convictions in the Circuit Court of Loudoun County for violations of Code § 18.2-152.3:1, the unsolicited bulk electronic mail (e-mail) provision of the Virginia Computer Crimes Act, Code §§ 18.2-152.1 through-152.15. For the reasons set forth below, we will affirm the judgment of the Court of Appeals.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

From his home in Raleigh, North Carolina, Jaynes used several computers, routers and servers to send over 10,000 e-mails within a 24-hour period to subscribers of America Online, Inc. (AOL) on each of three separate occasions. On July 16, 2003, Jaynes sent 12,197 pieces of unsolicited e-mail with falsified routing and transmission information onto AOL's proprietary network. On July 19, 2003, he sent 24,172, and on July 26, 2003, he sent 19,104. None of the recipients of the e-mails had requested any communication from Jaynes. He intentionally falsified the header information and sender domain names before transmitting the e-mails to the recipients, causing the Internet Protocol (IP) addresses to convey false information to every recipient about Jaynes' identity as the sender.1 However, investigators used a sophisticated database search to identify Jaynes as the sender of the e-mails.2 Jaynes was arrested and charged with violating Code § 18.2-152.3:1, which provides in relevant part:

A. Any person who:

1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers . is guilty of a Class 1 misdemeanor.

B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:

1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period.

Jaynes moved to dismiss the charges against him on the grounds that the statute violated the dormant Commerce Clause, was unconstitutionally vague, and violated the First Amendment. The circuit court denied that motion.

During trial, evidence demonstrated that Jaynes knew that all of the more than 50,000 recipients of his unsolicited e-mails were subscribers to AOL, in part, because the e-mail addresses of all recipients ended in "@aol.com" and came from discs stolen from AOL. Jaynes' e-mails advertised one of three products: (1) a FedEx refund claims product, (2) a "Penny Stock Picker," and (3) a "History Eraser" product.3 To purchase one of these products, potential buyers would click on a hyperlink within the e-mail, which redirected them outside the e-mail, where they could consummate the purchase. Jaynes operated his enterprise through several companies which were not registered to do business in North Carolina, and evidence was introduced as to billing and payment activities for these companies, including evidence that registration fees were paid to AOL with credit cards held by fictitious account holders.4

While executing a search of Jaynes' home, police discovered a cache of compact discs (CDs) containing over 176 million full e-mail addresses and 1.3 billion e-mail user names. The search also led to the confiscation of a storage disc which contained AOL e-mail address information and other personal and private account information for millions of AOL subscribers. Police also discovered multiple storage discs which contained 107 million AOL e-mail addresses. Richard Rubenstein, manager of technical security investigations at AOL, testified that the discs recovered at Jaynes' home "contained proprietary information" of "pretty near all" AOL account customers.5 The AOL user information had been stolen from AOL by a former employee and was in Jaynes' possession.

Dr. John Levine, a consultant and author, testified as an expert witness and explained that the e-mails sent by Jaynes were not consistent with solicited bulk e-mail, but rather constituted unsolicited bulk e-mail (sometimes referred to as "spam" e-mail) because Jaynes had disguised the true sender and header information and used multiple addresses to send the e-mails. He explained:

[H]ere the [e-mail] has been spread around nearly a thousand addresses. Where it's reasonable that you might use maybe a dozen addresses if you have a really big system and you're sending it from a dozen computers, I can't think of a valid reason why you would need to spread your e-mail over a thousand different addresses unless, again, you're trying to disguise the source.

The fact-both the fact that the domains do not seem plausible, they don't seem familiar, and the fact that it's spread out in a way that seems intended to disguise the origin of the mail, is what tells me this is not solicited e-mail.

AOL, which houses all of its e-mail servers in Virginia, was directly affected by Jaynes' spam e-mail attack.6 Brian Sullivan, the senior technical director for mail operations at AOL, testified that bulk e-mail "tends to create a lot of confusion" for AOL customers and that AOL receives "7 to 10 million complaints per day" regarding spam e-mails. Sullivan also described the impact of spam e-mails, explaining that "[i]f someone's mailbox is full because they got a truckload of spam and there's no more room, a message coming from Grandma is returned back to the sender. We can't take it at that point."

A jury convicted Jaynes of three counts of violating Code § 18.2-152.3:1, and the circuit court sentenced Jaynes to three years in prison on each count, with the sentences to run consecutively for an active term of imprisonment of nine years. The Court of Appeals affirmed his convictions, Jaynes v. Commonwealth, 48 Va.App. 673, 634 S.E.2d 357 (2006). We awarded Jaynes an appeal.

II. ANALYSIS

Jaynes makes four distinct assignments of error to the judgment of the Court of Appeals. First, he assigns error to the determination that the circuit court had jurisdiction over him on the crimes charged. Second, Jaynes contends Code § 18.2-152.3:1 "abridge[s] the First Amendment right to anonymous speech," and it was error not to reverse his convictions on that basis. Separately, Jaynes assigns as error the failure of the Court of Appeals to hold that Code § 18.2-152.3:1 is void for vagueness. Lastly, Jaynes posits that the statute violates the Commerce Clause of the United States Constitution.

A. Jurisdiction

Jaynes asserts that the Court of Appeals erred in holding that the circuit court had jurisdiction over him for violating Code § 18.2-152.3:1 because he did not "use" a computer in Virginia. He contends that a violation of that statute can occur only in the location where the e-mail routing information is falsified. Jaynes maintains that because he only used computers to send the e-mails from his home in Raleigh, North Carolina, he committed no crime in Virginia. Further, because he had no control over the routing of the e-mails, he argues his actions did not have an "immediate result" in Virginia, and under Moreno v. Baskerville, 249 Va. 16, 452 S.E.2d 653 (1995), could not be the basis for jurisdiction over him by Virginia courts. Therefore, according to Jaynes, the circuit court had no jurisdiction over him and his convictions are void.

To successfully prosecute a crime under Code § 18.2-152.3:1(B), the Commonwealth must establish all the elements of that crime. In addition to the element of transmission volume within a specific time period, the Commonwealth must prove the sender used a computer and that such use was with the intent of falsifying routing information. The Commonwealth must also prove that the transmission of such false routing information occurred in connection with the use of an e-mail provider's computer network for that transmission. Thus, the crime is not complete until there is e-mail transmission passing through or into the computer network of the e-mail provider or subscriber containing the false routing information.

Jaynes argues that he "merely sent e-mails that happened to be routed through AOL servers." We disagree. As the evidence established, all e-mail must flow through the recipient's e-mail server in order to reach the intended recipient. By selecting AOL subscribers as his e-mail recipients, Jaynes knew and intended that his e-mails would utilize AOL servers because he clearly intended to send to users whose e-mails ended in "@aol.com." The evidence established that the AOL servers are located in Virginia, and that the location of AOL's servers was information easily accessible to the general public. Applying our standard of review to the evidence presented along with all reasonable inferences therefrom, we conclude that the evidence supports the conclusion that Jaynes knew and intended that the e-mails he sent to AOL subscribers would utilize AOL's servers which are located in Virginia. Thus an intended and necessary result of Jaynes' action, the e-mail transmission through the computer network, occurred in Virginia.

Furthermore, a state may exercise jurisdiction over criminal acts that are committed outside the state, but are intended to, and do in fact, produce harm within the state. " 'It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which the evil is the fruit.' " Travelers Health Ass'n v. Commonwealth, 188 Va. 877, 892, 51 S.E.2d 263, 269 (1949) (citing Strassheim v. Daily, 221 U.S. 280, 284-85, 31 S.Ct. 558, 55 L.Ed. 735 (1911)).

Jaynes, relying on Moreno, argues that this principle, referred to as the "immediate result doctrine," is not applicable if third parties intervene between the out-of-state conduct and the in-state harm. In Moreno, the defendant, while in Arizona, arranged for delivery of drugs to an accomplice in Arizona who, in turn, delivered the drugs to two other accomplices who ultimately sold the drugs in Virginia. 249 Va. at 17-18, 452 S.E.2d at 654. Noting that drug distribution is not a continuing offense and that payment is not an element of the crime of drug distribution, id. at 18-20, 452 S.E.2d at 654-55, we concluded that the discrete crime of drug distribution was committed by the defendant while in Arizona and that the ultimate sale of the drugs in Virginia was not the "immediate result" of the distribution of drugs in Arizona because the subsequent distributions by Moreno's accomplices intervened. Id. at 19, 452 S.E.2d at 655.

Jaynes argues that an e-mail could be routed through a number of different mail handling networks before the e-mail reaches its destination, and that an e-mail sender cannot control the route used. Such routing, Jaynes contends, is the same type of intervention which occurred in Moreno. Therefore, according to Jaynes, the intervention of intermediate e-mail routers and servers prior to arrival of the e-mails at the AOL servers shows that the alleged harm through the AOL servers in Virginia was not the "immediate result" of Jaynes' actions in North Carolina.

Jaynes' reliance on Moreno fails because, as noted above, Jaynes' affirmative act of selecting AOL subscribers as recipients of his e-mails insured the use of AOL's computer network to deliver the e-mails and such use was the "immediate result" of Jaynes' action, regardless of any intermediate routes taken by the e-mails. Because the use of the computer network of an e-mail service provider or its subscribers is an integral part of the crime charged and because the use of AOL's e-mail servers was the "immediate result" of Jaynes' acts, we hold that Jaynes was amenable to prosecution in Virginia for a violation of Code § 18.2-152.1:3. Accordingly, the circuit court had jurisdiction over Jaynes.

B. First Amendment Standing

Jaynes next contends that Code § 18.2-152.3:1 is constitutionally deficient as overbroad under the First Amendment and therefore the statute cannot be enforced. He argues the Court of Appeals erred in affirming the circuit court's judgment which did not grant his motion to dismiss. Jaynes contends that under First Amendment jurisprudence, he has standing to raise the First Amendment claims of third parties and use those claims to defend his unrelated case. The Commonwealth initially responds that Jaynes lacks standing to raise a First Amendment challenge to the statute and therefore the First Amendment issues raised by Jaynes should not be addressed. The opinion of the Court of Appeals did not address the issue of standing as it decided the First Amendment claim on the merits. Because we hold the standing issue is dispositive, we do not address the analysis of the Court of Appeals.

Jaynes does not contest that he transmitted the tens of thousands of e-mails containing false and misleading sender information in contravention of Code § 18.2-152.3:1. He does not deny that act occurred, in fact, on several occasions, each of which was in direct violation of Code § 18.2-152.3:1(B).7 Further, Jaynes does not contest that the bulk e-mails were an attempt by him to sell commercial products for his pecuniary gain and constitute, in this case, unprotected commercial speech for First Amendment purposes. In other words, he does not dispute the e-mails have no First Amendment protection in their own right, and that the statute is not unconstitutional as applied to him.

Neither does Jaynes make a pure facial challenge to the statute alleging "that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Instead, in First Amendment parlance, Jaynes challenges the statute by claiming unconstitutional overbreadth. See Virginia v. Hicks, 539 U.S. 113, 118-19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).8 That is, Jaynes contends that because the statute could potentially reach the protected speech of a third party, a hypothetical person neither charged with a crime nor before this Court, he (Jaynes) is entitled to claim exoneration for his unprotected commercial speech because Code § 18.2-152.3:1 could encompass an unknown individual's potentially protected speech. This concept of the invalidity of a criminal statute as overbroad under the First Amendment is Jaynes' basis to assert he has standing to contest an otherwise valid conviction for admitted criminal conduct.

If Jaynes' claim of overbreadth invalidity were brought under nearly any other constitutional basis than the First Amendment, it is clear he would have no standing to assert the claims of others. See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) ("the general rule [is] that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court"); United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"). However, the United States Supreme Court has recognized an exception to the ordinary rules of standing when constitutional claims involve the First Amendment.

For example, in Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the Court noted the permissive standard for First Amendment standing:

As a corollary, the Court has altered its traditional rules of standing to permit-in the First Amendment area-"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Dombrowski v. Pfister, [380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965)]. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

413 U.S. at 612, 93 S.Ct. 2908; see New York v. Ferber, 458 U.S. 747, 768-69, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (citations omitted) ("The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by 'weighty countervailing policies'. The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted").

While cases such as Broadrick reflect broader standing for First Amendment overbreadth challenges, the decision of the United States Supreme Court in Hicks made clear that those rules of standing apply in federal courts where federal jurisdiction is at issue. The Supreme Court in Hicks leaves to the states an independent decision on overbreadth standing in a First Amendment context where the claim is made in a state court regarding a state statute.

1. Virginia v. Hicks

In Hicks, the United States Supreme Court confirmed that the several states have the constitutional authority to determine independently whether to allow a First Amendment overbreadth challenge to a state statute.

[O]ur standing rules limit only the federal courts' jurisdiction over certain claims. State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law. Whether Virginia's courts . entertain [an] overbreadth challenge is entirely a matter of state law.

Hicks, 539 U.S. at 120, 123 S.Ct. 2191 (citation omitted).

The Supreme Court in Hicks makes clear that the Broadrick standing concept applies only in the federal courts because: "our standing rules limit only the federal courts' jurisdiction over certain claims." 539 U.S. at 120, 123 S.Ct. 2191. While there is federal precedent to support Jaynes' claim of standing if his case were in a federal court on the issue of federal jurisdiction, it is noteworthy that the Supreme Court declined to opine on that issue in Hicks:

We accordingly proceed to [the] merits inquiry, leaving for another day the question whether our ordinary rule that a litigant may not rest a claim to relief on the legal rights or interests of third parties, see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), would exclude a case such as this from initiation in federal court.

After Hicks, there is no doubt that Virginia can establish the standing requirement for a litigant, like Jaynes, who brings a First Amendment overbreadth challenge. 539 U.S. at 120, 123 S.Ct. 2191. The issue then becomes what, if any, First Amendment standing requirement has been adopted in Virginia.

2. Virginia Standing

Citing Stanley v. City of Norfolk, 218 Va. 504, 237 S.E.2d 799 (1977), Jaynes argues there is an established First Amendment overbreadth standing requirement and relies on the following statement we made in Stanley:

[I]t appears that, for purposes of standing to make facial attacks, the Supreme Court makes a distinction between two separate concepts of overbreadth, viz., (a) due process overbreadth resulting from statutory language so vague that it could be selectively construed and enforced by police, prosecutors, and triers-of-fact to penalize persons not before the court, for conduct not before the court, without fair warning of the criminality of their conduct, and (b) First Amendment overbreadth resulting either from statutory language so vague it could "chill" the exercise of constitutionally protected speech or conduct, or from precise statutory language which expressly seeks to regulate protected speech, Gooding v. Wilson, 405 U.S. 518, 520-22, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), or to regulate the time, place, and manner of communicative conduct, see e.g., Grayned v. City of Rockford, 408 U.S. 104, 115-21, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), or to require prior approval of communicative conduct by officials vested with standardless discretionary power, see e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); or from statutory language which might be so applied as to burden innocent associations, see e.g., Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). It seems clear that, when overbreadth impinges upon First Amendment guarantees, a person accused under the statute has standing to make a facial attack, even though his own speech or conduct was not constitutionally protected; when overbreadth has only due process implications, he has no standing to make a facial attack but only standing to challenge the statute as applied to his own conduct.

218 Va. at 508, 237 S.E.2d at 801-02. However, Stanley and other cases Jaynes cites as making similar pronouncements do not have the precedential status he envisions, particularly as they relate to otherwise unprotected commercial speech.9

A review of case law on First Amendment standing before and after Stanley is particularly instructive. We begin with our decision in Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1972), in which the defendant, Bigelow, was convicted of "encouraging . the procuring of abortion by publication" when advertisements for abortion services ran in the weekly newspaper he managed. 213 Va. at 191-92, 191 S.E.2d at 174. On appeal, we determined Bigelow had no standing to assert a First Amendment overbreadth challenge to the operation of the statute at issue because his "activity was of a purely commercial nature." Id. at 198, 191 S.E.2d at 177. We distinguished our opinion in Owens because that case involved unlawful assembly and breach of the peace, not a commercial activity. Id.

Upon appeal to the United States Supreme Court, the case was remanded "for further consideration in light of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973)." Bigelow v. Virginia, 413 U.S. 909, 93 S.Ct. 3057, 37 L.Ed.2d 1020 (1973). Upon remand, we again affirmed Bigelow's conviction. Bigelow v. Commonwealth, 214 Va. 341, 342, 200 S.E.2d 680 (1973). The United States Supreme Court, on the second appeal, reversed our judgment. Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). The Supreme Court opined that this Court "erred in denying Bigelow standing to make this claim . without any consideration of whether the alleged overbreadth was or was not substantial," id. at 817, 95 S.Ct. 2222, but "decline[d] to rest [the] decision on overbreadth and . pass[ed] on to the further inquiry . whether the statute as applied . infringed constitutionally protected speech." Id. at 818, 95 S.Ct. 2222. Ultimately, the Supreme Court held the statute as applied to Bigelow violated his First Amendment rights. Id. at 829, 95 S.Ct. 2222.

During the pendency of the second Bigelow appeal in the United States Supreme Court, we decided the case of Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974). In Wayside Restaurant, operators of topless bars challenged an ordinance of the City of Virginia Beach in a declaratory judgment action. 215 Va. at 232, 208 S.E.2d at 52-53. The ordinance, inter alia, had been interpreted by the police to prohibit " 'topless' female dancers as entertainment" at the operators' bars. Id. at 232-33, 208 S.E.2d at 53. In the declaratory judgment action, the operators claimed "the ordinance is overbroad and violates the First Amendment guarantees of free speech and assembly." Id. at 233, 208 S.E.2d at 53. The circuit court rejected that claim.

On appeal, this Court noted "the crucial fact that the appellants are admittedly engaged in . a commercial enterprise" and then rejected the operators' First Amendment overbreadth claim for lack of standing. Id. at 234-35, 208 S.E.2d at 54.

The appellants advance a number of arguments that the ordinance is overbroad, i.e., that it would proscribe the wearing of many types of socially acceptable wearing apparel and beach wear, and that dancing, as a form of expression, is speech protected by the First Amendment. The rule is that where, as here, a line can be clearly drawn between commercial and noncommercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. [T]he appellants have no standing to assert the rights of those engaged in noncommercial activity.

Id. (citation omitted).

Although later decisions cited by Jaynes-Stanley, Esper Bonding Co. v. Commonwealth, 222 Va. 595, 283 S.E.2d 185 (1981), and Gray v. Commonwealth, 260 Va. 675, 537 S.E.2d 862 (2000)-all accorded standing to a defendant to "make a facial challenge invoking the First Amendment rights of third parties," Esper Bonding Co., 222 Va. at 597, 283 S.E.2d at 186, all of those cases involve noncommercial conduct by the defendants. Stanley concerned a charge of disorderly conduct during an assault and raised a due process overbreadth challenge and not a First Amendment claim. 218 Va. at 505-06, 237 S.E.2d at 800. Esper Bonding Co. involved the Commonwealth's attempt to assert third party rights regarding the forfeiture of a bail bond, which we denied. 222 Va. at 597-98, 283 S.E.2d at 186. Gray involved a challenge on vagueness grounds to a statute prohibiting possession of an unregistered silenced firearm. 260 Va. at 680-81, 537 S.E.2d at 865. The distinction between commercial and noncommercial speech set forth in Wayside Restaurant was never at issue. More importantly, Wayside Restaurant has never been overruled.

Even if the dicta in the Supreme Court's second Bigelow decision on First Amendment overbreadth standing was deemed to contradict the conclusion in Wayside Restaurant, that dicta has no force after the clear pronouncement in Hicks. The authority of the several states to make their own standing rules regarding an overbreadth challenge is unmistakable under Hicks: "our standing rules limit only the federal courts' jurisdiction. Whether Virginia's courts . entertain [an] overbreadth challenge is entirely a matter of state law." Hicks, 539 U.S. at 120, 123 S.Ct. 2191 (citation omitted). Thus, the force, if any, of the earlier Supreme Court decision in Bigelow on the issue of Virginia standing is clearly and unequivocally negated by Hicks.

As noted earlier, neither Stanley nor the other First Amendment standing cases cited by Jaynes addressed the standing distinction set forth in Wayside Restaurant.10 Thus, it would appear that Virginia does not accord standing to a person, such as Jaynes, whose actions involve only otherwise unprotected commercial speech, to assert the First Amendment rights of those who engage in noncommercial speech. However, to resolve the case at bar, it is unnecessary to resolve the extent of any precedential value of Wayside Restaurant.

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the United States Supreme Court recognized that certain commercial speech, even that "which does no more than propose a commercial transaction," can be entitled First Amendment protection. 425 U.S. at 776, 96 S.Ct. 1817 (Stewart, J., concurring). In later cases, the Supreme Court "recognized 'the " commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation,' " Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (quoting Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-56, 98 S.Ct. 1912, 56

L.Ed.2d 444 (1978)). "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Central Hudson Gas, 447 U.S. at 562-63, 100 S.Ct. 2343.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. 2343.

In Board of Trustees v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Supreme Court re-emphasized the holding in Central Hudson that the initial portal through which one claiming First Amendment protection for commercial speech must pass is that such speech "not be misleading." 492 U.S. at 475, 109 S.Ct. 3028 (quoting Central Hudson Gas, 447 U.S. at 566, 100 S.Ct. 2343). Commercial speech which fails this initial test does not receive First Amendment protection. Id. As the Court further noted in Fox, this result is, in part, due to the realization that "overbreadth analysis does not normally apply to commercial speech, [and] a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground-our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." Id. at 481, 109 S.Ct. 3028. While Central Hudson Gas and Fox did address First Amendment claims on the merits, the condition precedent recognized in each case as to whether a person's commercial speech can be accorded First Amendment protection, that the commercial speech not be misleading, seems equally applicable in an analysis of standing.

There is no question in this case that Jaynes' e-mails "propose a commercial transaction," Id. at 482, 109 S.Ct. 3028, and are thus some form of commercial speech. As noted earlier, Jaynes makes no claim that his commercial speech, on its own merits, is entitled to any First Amendment protection. Just as clearly, it is self-evident that Jaynes' e-mails are misleading because each contained intentionally false and inaccurate routing and header information intended to shield Jaynes from accountability for his sales schemes. Jaynes does not contest the e-mail routing and header information was false. Thus, Jaynes' commercial speech would fail the initial requirement for First Amendment review under Central Hudson Gas and Fox because it is "misleading" on its face. In that circumstance, it is reasonable not to accord the speaker of such misleading commercial speech, admittedly unprotected in its own right, standing to vicariously raise the First Amendment claims of others.

We therefore hold that Jaynes has no standing to raise a First Amendment objection to Code § 18.2-152.3:1. No Virginia standing should be accorded a person to assert an overbreadth challenge when that person's conduct consists of misleading commercial speech that is entitled to no First Amendment protection on its own merits.11 If we were to rule otherwise, a criminal defendant whose misleading commercial activities are clearly a crime and otherwise unprotected by the First Amendment gets an unrestricted invitation to apply for a "Get Out of Jail Free" card by merely pleading a hypothetical First Amendment infringement upon a hypothetical person not charged with a crime. This fails the test of common sense, but also seems unlikely to be a practical bulwark of defending First Amendment rights as decisions like Central Hudson Gas and Fox recognize.12

Jaynes thus has no standing to challenge the statute in question unless he could show there is no set of circumstances in which Code § 18.2-152.3:1 can be constitutionally applied. Salerno, 481 U.S. at 745, 107 S.Ct. 2095; see Parker v. Levy, 417 U.S. 733, 760, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) ("This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . covers a whole range of easily identifiable and constitutionally proscribable . conduct' ") (citations omitted); see also Davenport v. Washington Educ. Ass'n, 551 U.S. ----, ---- n. 5, 127 S.Ct. 2372, 2382 n. 5, 168 L.Ed.2d 71 (2007). As noted earlier, Jaynes does not make a pure facial challenge to the statute, and we therefore do not consider an argument on that basis. Rule 5:17; Rule 5:25. Moreover, it is self evident Jaynes could not establish that there is no set of circumstances which exist under which the statute would be valid; it is obviously applicable to him. Jaynes therefore lacks standing to raise the First Amendment claim.

C. Vagueness

Jaynes also contends that Code § 18.2-152.3:1 is unconstitutionally void for vagueness and that the Court of Appeals erred in not reversing the judgment of the circuit court on that basis. He argues that the as-applied standard for vagueness used by the Court of Appeals was improper because his challenge was to the facial validity of the statute. The Commonwealth responds that Jaynes does not have standing to bring a vagueness challenge to the statute because the statute clearly applied to him. We agree with the Commonwealth.

The United States Supreme Court, in Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) explained the standard for a vagueness challenge:

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Id. at 494-95, 102 S.Ct. 1186 (emphasis added). Additionally, the United States Supreme Court stated in Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), that: "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." This Court, citing Hoffman Estates and Parker, restated this principle in Commonwealth v. Hicks, 267 Va. 573, 596 S.E.2d 74 (2004),13 "[i]t is clear that [one] who . engaged in conduct prohibited [by the statute] may not complain that the [statute] is purportedly vague." Id. at 581, 596 S.E.2d at 78.

As the United States Supreme Court in Parker and Hoffman Estates, as well as this Court in Hicks II, has made consistently clear, one does not have standing to make a facial challenge to a statute on the basis of unconstitutional vagueness if the statute plainly applies to that person on the facts of the case. As the Supreme Court further stated in Parker, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." 417 U.S. at 757, 94 S.Ct. 2547 (citation omitted). Jaynes cannot make this claim.

Jaynes was convicted under the felony provisions of Code § 18.2-152.3:1(B), which clearly sets out what constitutes unsolicited bulk e-mail.14 Jaynes could not reasonably be unaware from the language of the statute that his multiple transmissions of more than 10,000 e-mails within the proscribed period violated subsection (B). His claim that he would not understand what constituted "unsolicited bulk electronic mail" is without merit in the clear context of subsection (B) of the statute.

The bulk e-mails were plainly unsolicited given the evidence at trial that Jaynes had received a list of stolen e-mail addresses of AOL customers and there was no evidence any recipient requested or consented to the e-mails. In the context of this record, Jaynes' claim of vagueness for the term "unsolicited" is devoid of merit. Evidence at trial indicated no basis upon which Jaynes could claim vagueness as to the meaning of "falsify" or "electronic mail transmission information." Thus, the statute undoubtedly applies to Jaynes' conduct, and therefore, he has no standing to challenge the statute for vagueness.15 Hicks II, 267 Va. at 580-81, 596 S.E.2d at 78.

D. Dormant Commerce Clause

Jaynes also contends that the Court of Appeals erred because it did not hold that Code § 18.2-152.3:1 violates the Commerce Clause, Art. 1, Section 8 of the United States Constitution. The Commerce Clause provides that, "[t]he Congress shall have power . [t]o regulate commerce . among the several states." U.S. Const., art. I, § 8, cl. 3. The Commerce Clause has been said to contain a "dormant" aspect which limits a state's ability to "discriminate [] against or unduly burden [] interstate commerce and thereby imped[e] free private trade in the national marketplace." PSINet, Inc. v. Chapman, 362 F.3d 227, 239 (4th Cir.2004) (citations omitted).

Jaynes sole argument on appeal is that the statute is "per se invalid because its practical effect is to regulate wholly extraterritorial e-mail transactions." The Commonwealth acknowledges that a rule of "virtual per se invalidity" applies if a state statute discriminates "either on its face, or in practical effect" against interstate commerce. (Emphasis omitted.)

A state statute may violate the dormant Commerce Clause if it discriminates against interstate commerce, favoring "in-state economic interests over out-of-state interests," Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986), or if it has the " 'practical effect' of regulating commerce occurring wholly outside that State's borders." Healy v. Beer Institute, 491 U.S. 324, 332, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Id. at 337 n. 14, 109 S.Ct. 2491 (citation omitted).

Jaynes asserts that Code § 18.2-152.3:1 falls within the second category of violation because it affects e-mails that "merely pass through Virginia servers en route to their final destinations," thus regulating wholly extraterritorial e-mail transactions.

In rejecting Jaynes' dormant Commerce Clause argument, we first note that his argument contains an inherent contradiction. An e-mail that passes through Virginia cannot be a "wholly extraterritorial" transaction. Nevertheless, the sender of an e-mail cannot insure that the e-mail will not at some point pass through Virginia. This factual reality of e-mail transmission has the potential of burdening interstate commerce because e-mail senders may have a heightened concern of possible criminal prosecution if their e-mails were routed through Virginia without their direction or knowledge.

To determine if this burden invalidates the statute, we apply the balancing test recited in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970): "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

In this case, the legitimate local public interest in preventing the proliferation of falsified unsolicited bulk e-mail, or "spam", is well documented. The Federal Government and many states have adopted anti-spam statutes. See, e.g., Arminda B. Bepko, Note: A State-By-State Comparison of SPAM Laws, 13 Media L. & Pol'y 20 (2004). Congress has recognized that unsolicited e-mail may result in costs to recipients, and impose significant monetary costs on providers of Internet access services. 15 U.S.C. § 7701 (2004). Furthermore, Congress has specifically allowed the states to regulate spam that involves "falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b). As noted earlier, Jaynes' e-mails were unquestionably commercial and contained false routing and header information. It is clear that the Commonwealth has a strong local interest in, and gains local benefits from, regulating the type of e-mail proscribed by Code § 18.2-152.3:1.

By contrast, the effects of this statute on interstate commerce are incidental and do not impose an undue burden. Whatever burden there may be is the same for a Virginia or a non-Virginia unsolicited bulk e-mail sender. The only burden placed on the e-mail sender is that the e-mail not contain false or forged transmission information. In the realm of legitimate commercial transactions, true identification of the market participant would seem to be the norm, not the transmission of e-mails with false identification. In comparing the obvious local benefit with the minimal burden on in-state or out-of-state commerce, both the Court of Appeals and the circuit court cited oft-quoted commentators:

Even assuming that the antispam laws do not significantly further the state's interest, it is hard to see how the antispam laws burden interstate commerce at all. The spam laws essentially require truthfulness in the header, return address, and subject line of the e-mail. Far from burdening commerce, the truthfulness requirement facilitates it by eliminating fraud and deception. Compliance with the various antispam statutes is easy compared to noncompliance, which requires the spammer to incur costs of forging, re-mailing, and the like.

Jack L. Goldsmith and Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 819 (2001).16

For these reasons, we conclude that Code § 18.2-152.3:1 does not violate the dormant Commerce Clause.

III. CONCLUSION

In conclusion, we hold that the circuit court had jurisdiction over Jaynes. We also hold that Jaynes does not have standing to make a First Amendment overbreadth challenge to Code § 18.2-152.3:1. Finally, we hold that Jaynes' vagueness argument is without merit, and the statute does not violate the Commerce Clause. We will therefore affirm the judgment of the Court of Appeals upholding these convictions and sentences.

Affirmed.

I concur in the majority's conclusions on the issues of jurisdiction, vagueness and the Commerce Clause. However, I cannot join the majority's decision that Jaynes does not have standing to raise a First Amendment claim that Code § 18.2-152.3:1 is unconstitutionally overbroad. As discussed below, I firmly believe that the policy reflected in other cases of this Court and virtually all other state and federal courts allowing litigants under very limited circumstances to raise constitutional challenges to statutes alleged to unconstitutionally burden the First Amendment right of free speech of third parties is the correct policy. Furthermore, by rejecting this exception to the standing rule, the majority sends those litigants who raise an overbreadth challenge to statutes of this Commonwealth to the federal judicial system to construe such Virginia statutes and determine whether they are constitutional. I believe that the courts of this Commonwealth, not the federal courts, have the primary responsibility to consider and construe the statutes of this Commonwealth.

A. Standing

The majority opinion clearly and correctly recites that, as a general rule, a litigant has standing to sue only to vindicate those rights possessed by the litigant. The reasons for this standing requirement reflect important policy considerations including the principle that courts should not issue advisory opinions on factual situations not before it. See e.g., Commonwealth v. Harley, 256 Va. 216, 219-20, 504 S.E.2d 852, 854 (1998)(courts not constituted to render advisory opinions). The majority also identifies a limited exception to this rule that is made in one isolated but significant area. The exception allows a litigant to challenge a statute as overbroad in violation of rights protected by the First Amendment to the United States Constitution even if the challenger engaged in activity that is not entitled to constitutional protection. The United States Supreme Court has often expressed the reason for allowing this exception:

This "exception to the usual rules governing standing," Dombrowski v. Pfister, 380 U.S. [479,] 486 [85 S.Ct. 1116 (1945)], reflects the transcendent value to all society of constitutionally protected expression. We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. [415,] 433 [83 S.Ct. 328, 9 L.Ed.2d 405 (1963)].

Bigelow v. Virginia, 421 U.S. 809, 816, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) ("Bigelow II").

We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech-especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.

Virginia v. Hicks, 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (citations omitted).

This standing exception, however, is not without limits. When this exception is applied, enforcement of the offending statute will be invalidated only in instances in which the statute "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.' " Id. at 118-19, 123 S.Ct. 2191 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). Furthermore, courts are instructed to apply a limiting construction or partial invalidation to the statute if available in order to remove the constitutionally offending application and avoid the invalidating enforcement of the entire statute. See Virginia v. Hicks, 539 U.S. at 119, 123 S.Ct. 2191 (quoting Broadrick, 413 U.S. at 613, 93 S.Ct. 2908). These limitations prevent widespread misuse of the exception and provide a realistic balance between the policies underlying general principles of standing and the policies supporting the exception to standing.

In my opinion the rationale for the exception to the normal rule of standing is as valid today as it was when first adopted in 1940. See Thornhill v. Alabama, 310 U.S. 88, 96-100, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Indeed, it may be even more relevant in this era of communication through the Internet. The current use of the Internet as the marketplace for expressing political ideas, views and positions emphasizes the need for insuring that use of this medium not be chilled by the threat of criminal prosecution. Those persons wishing to use this medium should have the same ability to express their views anonymously as did Thomas Paine during the founding of our country.

The majority's decision is especially problematic when viewed in the context of our cases that have acknowledged that persons engaged in unprotected activity could raise an overbreadth challenge to statutes of this Commonwealth in the courts of this Commonwealth, even if such challenges were not dispositive or successful in the case. See Esper Bonding Co. v. Commonwealth, 222 Va. 595, 283 S.E.2d 185 (1981), Pedersen v. City of Richmond, 219 Va. 1061, 254 S.E.2d 95 (1979), Stanley v. City of Norfolk, 218 Va. 504, 237 S.E.2d 799 (1977), Owens v. Commonwealth, 211 Va. 633, 179 S.E.2d 477 (1971). The majority concludes that these cases have no precedential value because they did not involve litigants engaged in commercial speech, and although the cases acknowledged the existence of the standing exception, the defendants did not prevail on that basis.

In contrast, the majority vests precedential value in the 1974 case of Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974), asserting that in that case this Court refused to allow standing to a defendant engaged in commercial conduct (topless dancing in a restaurant) to raise the "hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment." Id. at 235, 208 S.E.2d at 54. Observing that no subsequent case of this Court has addressed Wayside Restaurant, the majority, without determining the extent of the case's precedential value, concludes that "Virginia does not accord standing to a person, such as Jaynes, whose actions involve only otherwise unprotected commercial speech, to assert the First Amendment rights of those who engage in noncommercial speech." It is on the basis of this "standing rule" drawing a distinction between unprotected commercial and noncommercial speech, that the majority builds its case for denying Jaynes standing here. Not only do I reject this distinction as a legitimate basis for discriminating in the application of the standing exception, infra, the historical context of Wayside Restaurant and the opinion itself, in my view, do not create the "standing rule" and "apparent" precedential value found by the majority.

As the majority acknowledges, Wayside Restaurant was decided while Bigelow II, was pending in the United States Supreme Court. The defendant in that case, a publisher of an advertisement for a doctor who performed abortions, sought to use the exception to the standing rule to assert a First Amendment overbreadth challenge to the statute. When that case was before this Court, the Attorney General argued that the defendant "lacks standing to assert the hypothetical rights of others." Bigelow v. Commonwealth, 213 Va. 191, 197, 191 S.E.2d 173, 177 (1972) ("Bigelow I"). The defendant and the dissent asserted that the requisite standing existed, relying upon a previous case of the Court in which the Court stated that "where First Amendment liberties are involved, persons who engage in non-privileged conduct are not precluded from attacking a statute under which they were convicted." Owens, 211 Va. at 638-39, 179 S.E.2d at 481. The United States Supreme Court reversed this Court after Wayside Restaurant was decided, noting that this Court had recognized the exception to the standing rule when a litigant was asserting the First Amendment rights of third parties. Bigelow II, 421 U.S. at 816, 95 S.Ct. 2222. Although the standing exception was not dispositive in Bigelow II because the General Assembly had amended the statute under constitutional attack, after the Supreme Court's decision in Bigelow II no Virginia case has questioned directly or indirectly the applicability of the standing exception in Virginia.

The Court's most recent, and perhaps the most compelling, recognition of the standing exception occurred in Commonwealth v. Hicks, 264 Va. 48, 563 S.E.2d

674 (2002) ("Hicks I "). In that case the majority applied the United States Supreme Court's exception to the standing rule reciting that "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible." Id. at 55, 563 S.E.2d at 678. The dissent in Hicks I, although concluding that the majority failed to consider whether the policy's overbreadth was sufficiently substantial, nevertheless, did not question the legitimacy of the standing exception, the exception which the majority abandons in this case. Id. at 64, 563 S.E.2d at 683 (Kinser, J., concurring in part and dissenting in part). If principles of precedent and stare decisis are to be applied, in my opinion, the unbroken recognition and application of the standing exception outweighs and belies a rule "established" in 1974 based on the dichotomy of commercial and non-commercial speech.

Furthermore, my reading of Wayside Restaurant does not lead me to the conclusion that the clear rule advocated by the majority was established in that case. Consider the critical part of the Court's opinion in Wayside Restaurant upon which the majority relies:

The appellants advance a number of arguments that the ordinance is overbroad, i.e., that it would proscribe the wearing of many types of socially acceptable wearing apparel and beach wear, and that dancing, as a form of expression, is speech protected by the First Amendment. The rule is that where, as here, a line can be clearly drawn between commercial and noncommercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment.

Wayside Restaurant, 215 Va. at 234-35, 208 S.E.2d at 54. Nothing in this passage indicates that the Court considered the third party rights asserted by restaurant owners as First Amendment rights. The Court did not cite Bigelow I as authority for the proposition so clearly stated by the Court in that case only two years earlier and which, at that time, was still the prevailing law on the issue. Furthermore, although the defendant restaurant companies asserted that topless dancing was a form of speech, the Court did not treat the activity as speech but only commercial conduct, stating that "[n]o evidence was presented which establishes that we are dealing with more than mere conduct, which is a fit subject of regulation under the police power, as opposed to a mixture of conduct and speech." Id. at 236, 208 S.E.2d at 55. Accordingly, I do not view Wayside Restaurant as creating a "standing rule" precluding persons who engage in commercial activity from asserting the First Amendment rights of third parties when those rights are burdened by a constitutionally overbroad statute.

Finally, when the Court in Wayside Restaurant drew a distinction between commercial and non-commercial speech, the law was unsettled regarding whether commercial speech was entitled to any constitutional protection. Indeed, in another Virginia case decided by the United States Supreme Court one year after Bigelow I, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1975), the Commonwealth argued, as it had in Bigelow I and II, that commercial speech was outside the protection of the First Amendment. The Supreme Court acknowledged that past decisions gave "some indication that commercial speech is unprotected," citing Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), as an example. Virginia State Board of Pharmacy, 425 U.S. at 758, 96 S.Ct. 1817. The Court however, noted that by the time Bigelow II was issued, "the notion of unprotected 'commercial speech' all but passed from the scene," and clearly held that commercial speech was entitled to protection under the First Amendment. 425 U.S. at 759, 770, 96 S.Ct. 1817. Breard, the case cited by the United States Supreme Court as a case indicating that commercial speech was not entitled to any constitutional protection, was the same case cited by the Court in Wayside Restaurant in connection with the distinction between commercial and non-commercial speech. Wayside Restaurant, 215 Va. at 235, 208 S.E.2d at 54.

For these reasons I do not accord Wayside Restaurant the "apparent" precedential value given it by the majority, nor do I read the case as establishing a rule which has not been altered limiting the previously recognized exception to the standing rule in commercial speech cases. Rather, in my opinion, a fair reading of the cases of this Court supports the conclusion that the exception to the standing rule was recognized and applied as late as 2002 by this Court without any preclusion of litigants involved in commercial speech or conduct.

The majority does not base its new standing rule solely on the "standing rule" of Wayside Restaurant. The majority, relying on the phrase in Virginia v. Hicks that the states are free to decide for themselves whether they want to recognize the standing exception, 539 U.S. at 120, 123 S.Ct. 2191, concludes that our prior recognition of the exception was done under the mistaken belief that states had to recognize the standing exception adopted in the federal system. According to the majority, now freed from that mistaken belief, this Court is free to reexamine our position and, as a matter of policy, should no longer allow such exception. Again I disagree.

First, the statement by the Supreme Court in Virginia v. Hicks that states were not bound by the federal rules of standing, id., is not a pronouncement of new law; it is nothing more than a statement of an obvious long standing principle. See ASARCO, Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (the standing requirements of federal courts do not apply to state courts, even when the state courts consider federal law). City of Los Angeles v. Lyons, 461 U.S. 95, 113, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) ("[S]tate courts need not impose the same standing or remedial requirements that govern federal [ ] court proceedings.") Of course, this Court can always change its mind, as the majority has done here. But such changes, in my opinion, should be made only after studied consideration of competing policies and the implications of the proposed change.

The primary reason for the new standing policy, as expressed by the majority, is its belief that a litigant who engages in "unprotected" commercial speech should not be able to secure a "get out of jail free" card. While this may be an admirable policy as it relates to the litigant, there is no indication that the majority weighed its rationale or new policy against the danger or harm to society imposed by the overbroad statute. Thus, I can only surmise that the majority found those societal dangers of less importance and concluded that federal courts are a better or an acceptable venue for construing the constitutionality of Virginia statutes challenged on the basis of overbreadth.

Furthermore, although the majority seems to deny standing to only one class of litigants-purveyors of deceptive commercial speech-this decision will, in my opinion, result in the complete eradication of the standing exception. Indeed, the majority specifically defines the defendant's activity as unprotected speech.1 Indeed, by definition the exception to the standing rule is only needed because the challenger seeking to raise the First Amendment rights of third parties is not engaged in protected speech or conduct. In all the cases of this Court, which the majority considers of no precedential value or irrelevant to the instant case because they did not involve commercial activity, the litigant was involved in unprotected activity.

Because the rationale for the standing exception requires that one engaged in unprotected speech be allowed to raise the rights of those engaged in protected speech, I can find no principled basis for discriminating between the types of unprotected activity for purposes of applying the standing exception. Indeed, in light of the Court's decision today, it is difficult to imagine how this Court could, in the future, find a rational basis to allow a litigant engaged in unprotected speech or conduct to challenge a statute as unconstitutionally overbroad utilizing the standing exception. I can imagine no persuasive rationale for a policy that suggests a litigant engaged in unprotected commercial speech cannot qualify for the standing exception because that individual should not receive a "get out of jail free" card, but that a litigant engaging in any other unprotected activity could qualify for the exception. Consequently, although the majority may believe today's decision affects a limited number of defendants, in my opinion, the rationale underlying the majority's new classification will effectively eliminate the exception to the standing rule in all cases. As a result of this decision, those who wish to distribute their political views anonymously via the Internet must do so do under the threat of criminal prosecution and those who seek to challenge this statute or similar constitutionally suspect statutes must turn to the federal courts.

Because I would continue this Court's prior policy of recognizing the exception to the standing rule, I would allow Jaynes to pursue his First Amendment claim that Code § 18.2-152.3:1 is overbroad. In considering Jaynes' First Amendment challenge, I conclude for the following reasons that the statute is unconstitutionally overbroad and therefore would reverse the judgment of the Court of Appeals and dismiss the charges against Jaynes.

B. Constitutionality of Code § 18.2-152.3:1

As shown by the record, because e-mail transmission protocol requires entry of an IP address and domain name for the sender, the only way such a speaker can publish an anonymous e-mail is to enter a false IP address or domain name. Therefore, like the registration record on file in the mayor's office identifying persons who chose to canvass private neighborhoods in Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002), registered IP addresses and domain names discoverable through searchable data bases and registration documents "necessarily result [] in a surrender of [the speaker's] anonymity." Id. at 166, 122 S.Ct. 2080. The right to engage in anonymous speech, particularly anonymous political speech, is "an aspect of the freedom of speech protected by the First Amendment." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). By prohibiting false routing information in the dissemination of e-mails, Code § 18.2-152.3:1 infringes on that protected right. The Supreme Court has characterized regulations prohibiting such anonymous speech as "a direct regulation of the content of speech." Id. at 345, 115 S.Ct. 1511.

State statutes that burden "core political speech," as this statute does, are presumptively invalid and subject to a strict scrutiny test. Id. at 347, 115 S.Ct. 1511. Under that test a statute will be deemed constitutional only if it is narrowly drawn to further a compelling state interest. Id. In applying this test, we must also consider that state statutes are presumed constitutional, City Council v. Newsome, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984), and any reasonable doubt regarding constitutionality must be resolved in favor of validity, In re Phillips, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003).

There is no dispute that the statute was passed to control the transmission of unsolicited commercial bulk e-mail, generally referred to as SPAM. In enacting the federal CAN-SPAM Act, Congress stated that commercial bulk e-mail threatened the efficiency and convenience of e-mail. 15 U.S.C. § 7701(a)(2). Many other states have regulated unsolicited bulk e-mail but have restricted such regulation to commercial e-mails. See e.g., Ariz.Rev.Stat. § 44-1372.01; Ark.Code Ann. § 4-88-603; Cal. Bus. & Prof.Code § 17538.45; Fla. Stat. § 668.603; Idaho Code § 48-603E; Ill. Comp. Stat., tit. 815 § 511/10; Ind.Code § 24-5-22-7; Kan. Stat. Ann. § 50-6, Md.Code Ann., Commercial Law § 14-3002. There is nothing in the record or arguments of the parties, however, suggesting that unsolicited non-commercial bulk e-mails were the target of SPAM filters, caused increased costs to the Internet service providers, or were otherwise a focus of the problem sought to be addressed by the Virginia legislation that became Code § 18.2-152.3:1.

Jaynes does not contest the state's interest in controlling unsolicited commercial bulk e-mail as well as fraudulent or otherwise illegal e-mail. Nevertheless, Code § 18.2-152.3:1 is not limited to instances of commercial or fraudulent transmission of e-mail, nor is it restricted to transmission of illegal or otherwise unprotected speech such as pornography or defamation speech. Therefore, the legislation is not narrowly tailored to protect the compelling interests advanced.

C. Substantial Overbreadth

The Commonwealth argues that enforcement of Code § 18.2-152.3:1 should not be precluded because, even if unconstitutionally overbroad, that remedy is limited to those statutes that are substantially overbroad. The concept of substantial overbreadth is not a test of the constitutionality of a statute, but a policy related to the remedy flowing from a successful facial challenge. A successful facial overbreadth challenge precludes the application of that statute in all circumstances. Recognizing the sweep of this remedy, the United States Supreme Court has stated that it will not impose such an expansive remedy where the chilling effect of an overbroad statute on constitutionally protected rights cannot justify prohibiting all enforcement of the law. "For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech." Virginia v. Hicks, 539 U.S. at 119, 123 S.Ct. 2191. Thus a statute should be declared facially overbroad and unconstitutional only if the statute "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.' " Id. at 118-19, 123 S.Ct. 2191 (citing Broadrick, 413 U.S. at 615, 93 S.Ct. 2908).

The Commonwealth argues that Code § 18.2-152.3:1 is not substantially overbroad because it does not impose any restrictions on the content of the e-mail and "most" applications of its provisions would be constitutional, citing its application to unsolicited bulk commercial e-mail, unsolicited bulk e-mail that proposes a criminal transaction, and unsolicited bulk e-mail that is defamatory or contains obscene images. According to the Commonwealth an "imagine[d] hypothetical situation where the Act might be unconstitutional as applied does not render the Act substantially overbroad." Prohibiting all anonymous political, religious, or other expressive speech as Jaynes asserts is not an insignificant "hypothetical situation." I reject the Commonwealth's argument that Jaynes' facial challenge to Code § 18.2-152.3:1 must fail because the statute is not "substantially overbroad."

D. Narrowing Construction

Our jurisprudence requires us to interpret a statute to avoid a constitutional infirmity. Burns v. Warden, 268 Va. 1, 2, 597 S.E.2d 195, 196 (2004). Nevertheless, construing statutes to cure constitutional deficiencies is allowed only when such construction is reasonable. Virginia Soc'y for Human Life v. Caldwell, 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998). A statute cannot be rewritten to bring it within constitutional requirements. Reno v. ACLU, 521 U.S. 844, 884-85 & nn. 49-50, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997); Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988).

According to the Commonwealth, Code § 18.2-152.3:1 could avoid constitutional infirmity through a declaration that the statute does not apply to "unsolicited bulk non-commercial email that does not involve criminal activity, defamation or obscene materials." Alternatively the Commonwealth suggests that the statute be construed to apply only in instances where the receiving Internet service provider "actually objects to the bulk e-mail."

The construction urged by the Commonwealth is not a reasonable construction of the statute. Nothing in the statute suggests the limited applications advanced by the Commonwealth. The Commonwealth's suggested construction requires rewriting Code § 18.2-152.3:1. That task is one for the General Assembly, not the courts.

E. Trespass

The Commonwealth also argues that Code § 18.2-152.3:1 is like a trespass statute, prohibiting trespassing on the privately owned e-mail servers through the intentional use of false information and that no First Amendment protection is afforded under these circumstances. I disagree.

Trespass is the unauthorized use of or entry onto another's property. See e.g., Vines v. Branch, 244 Va. 185, 190, 418 S.E.2d 890, 894 (1992) ("Where a person has illegally seized the personal property of another and converted it to his own use, the owner may bring an action in trespass, trover, detinue, or assumpsit."); Code § 18.2-119, -125, -128, -132.

Code § 18.2-152.3:1 does not prohibit the unauthorized use of privately owned e-mail servers. It only prohibits the intentional use of false routing information in connection with sending certain e-mail through such servers. Thus, even if an e-mail service provider specifically allowed persons using false IP addresses and domain names to use its server, the sender could be prosecuted under the statute although there was no unauthorized use or trespass. Therefore, Code § 18.2-152.3:1 is not a trespass statute.

The Commonwealth's argument that there is no First Amendment right to use false identification to gain access to private property is inapposite. First, in making this argument the Commonwealth uses the terms "false" and "fraudulent" interchangeably. Those concepts are not synonymous.2 At issue here is the statute's prohibition of "false" routing information. Second, the cases upon which the Commonwealth relies are civil cases between Internet service providers and the entities engaged in sending commercial unsolicited bulk e-mails: America Online, Inc. v. IMS, 24 F.Supp.2d 548 (E.D.Va.1998), CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D.Ohio 1997), and Cyber Promotions, Inc. v. American Online, Inc., 948 F.Supp. 436 (E.D.Pa.1996). In litigation between these private parties, the courts have held that the unauthorized use of the Internet service providers' property constituted common law trespass and that a First Amendment claim could not be raised against the owner of private property. These cases have no relevance here because this is not a trespass action by a private property owner and the First Amendment right is not being asserted against the owner of private property, but against government action impacting the claimed First Amendment right.

F. Conclusion

For the reasons stated, I would find Code § 18.2-152.3:1 unconstitutionally overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment to the United States Constitution. I would therefore reverse the judgment of the Court of Appeals and vacate Jaynes' convictions of violations of Code § 18.2-152.3:1.

FOOTNOTES

1. Simple Mail Transfer Protocol (SMTP) is what an e-mail server uses to transmit an e-mail message, and the SMTP requires verification of the sender's IP address and domain. Evidence at trial demonstrated that Jaynes sent the e-mails with nonexistent domains which did not correspond to the sending IP addresses.

2. Computers may be identified by their unique IP address number, which consists of blocks of numerals separated by periods.

3. Although Jaynes advertised only three products, he created false sender information for each e-mail, using thousands of different IP addresses, user names and website links.

4. Jaynes' enterprises were apparently quite successful. Although not introduced as evidence during the guilt stage of the trial, counsel for the Commonwealth informed the Court following the jury verdict against Jaynes and during the discussion of bond for Jaynes that Jaynes' "[p]ersonal financing statement list[s] assets at $17 million and a net worth of $24 million," and his income from all of his businesses exceeded $1 million in 2001, 2002 and 2003.

5. The data on the disc contained, among other things, "a raw dump of the AOL member database" which "contains information about [AOL] subscribers, how they choose to be billed, their email address, specific AOL data fields such as an account number, things of that nature."

6. At trial, evidence demonstrated that all of AOL's servers were located in Virginia, although some were located in Loudoun County and others were located in Manassas.

7. The misdemeanor provisions of Code § 18.2-152.3:1(A) are not before the Court.

8. Unlike a "facial" or "as applied" challenge, an overbreadth challenge "suffices to invalidate all enforcement of that law" upon showing that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.' " Hicks, 539 U.S. at 118-19, 123 S.Ct. 2191 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

9. Jaynes also relies upon our opinions in Gray v. Commonwealth, 260 Va. 675, 681, 537 S.E.2d 862, 865 (2000) (holding "[d]efendant has no standing to mount a broad, general, facial statutory challenge because he does not contend his conduct was constitutionally protected nor is the First Amendment implicated"), Esper Bonding Co. v. Commonwealth, 222 Va. 595, 597, 283 S.E.2d 185, 186 (1981) (confirming general rule for standing and noting limited exceptions, including in the First Amendment context), and Owens v. Commonwealth, 211 Va. 633, 638-39, 179 S.E.2d 477, 481 (1971) (finding standing to assert First Amendment overbreadth claim regarding a statute which restricted the right to assemble), to support his claim that Virginia allows overbreadth standing in all cases which might implicate the First Amendment.

10. The dissent's reference to Commonwealth v. Hicks, 264 Va. 48, 563 S.E.2d 674 (2002)("Hicks I") is misplaced as that case did not involve commercial speech.

11. As Jaynes has no standing under this standard, we do not decide today the continuing precedential effect, if any, of Wayside Restaurant. The exception to standing we announce today is narrow and directed. Accordingly, we note that the dissent's statement that "this decision will . result in the complete eradication of the standing exception" has no basis in our decision and is unfounded.

12. See also Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (confirming that "[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading"); 44 Liquormart v. Rhode Island, 517 U.S. 484, 496, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (confirming that commercial speech is protected when it is "accurate," "truthful and nonmisleading").

13. Commonwealth v. Hicks, sometimes referenced as Hicks II, was the case subsequent to Virginia v. Hicks, 539 U.S. 113, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) and was considered by this Court on remand from the United States Supreme Court. For purposes herein, we will reference this case as Hicks II.

14. Jaynes' counsel admitted during oral argument before this Court that the statutory reference to "bulk" was clearly defined.

15. A misdemeanor conviction under Code § 18.2-152.3:1, subsection (A), is not before us in this appeal, and we express no opinion as to whether that subsection of the statute may be unconstitutional based on vagueness.

16. Furthermore, it is highly unlikely that the sender of an e-mail which is passed through a router or server in Virginia at the direction of another router or server would be subject to criminal prosecution. Such an actor shares little in common with Jaynes who directed and insured that the AOL servers would be used to transmit his e-mails and thus, as discussed above, vested jurisdiction in Virginia courts.

1. I do not agree with the majority's conclusion that Jaynes' commercial speech was "unprotected" because the routing information was false. Commercial speech is afforded constitutional protection based on the informational function of advertising. When such information does not accurately inform the public about lawful activity, it is not entitled to constitutional protection and may be banned. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The routing information at issue here, while false, is not part of the commercial speech aimed at the recipient of the e-mail and indeed, if appearing on the e-mail at all, is likely not to be even noticed by the recipient. It is not, in my opinion, inaccurate information about a lawful activity that is not entitled to constitutional protection as commercial speech.

2. Fraud is a knowing misrepresentation made to induce another to act to his detriment. Klaiber v. Freemason Assocs., 266 Va. 478, 485, 587 S.E.2d 555, 558 (2003).

OPINION BY Justice G. STEVEN AGEE.

EXHIBIT K

***Rawson v. C.P. Partners, LLC*, 2005 TCPA Rep. 1407 (Ill. Cir. Sept. 30, 2005)**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT
CHANCERY DIVISION

JEROLD S. RAWSON, on behalf of himself and all others similarly situated, Plaintiff,

v.

C.P. PARTNERS, L.L.C., doing business as COMFORT INN O'HARE, and JOHN DOES 1-20,Defendants.

No. 03 CH 14510.

Calendar 6.

September 30, 2005.

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

RESULT:

Motion for class certification granted.

SYNOPSIS:

[under review]

SUBSEQUENT HISTORY:

none found

PRIOR HISTORY:

none found

APPEARANCES:

not reported

JUDGES:

Patrick E. McGann, Judge.

HEADNOTES:

[under review]

OPINION:

MEMORANDUM OPINION AND ORDER

[***1**] Plaintiff, Jerold Rawson ("Rawson") on behalf of himself and all others similarly situated, moves, pursuant to Section 2-801 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, to certify a class of all persons with Illinois fax numbers who, on or after four years prior to the filing of this action, were sent advertising faxes promoting Defendant C.P. Partners, L.L.C. ("CP Partners"), products and services, to whom Defendant cannot provide evidence of prior express permission for the sending of such faxes. Defendant objects to class certification with respect to three of Section 2-801's requirements: (1) the requirement that there be "questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members" 735 ILCS 5/2-801(2); (2) the

requirement that the class action be "an appropriate method for the fair and efficient adjudication of the controversy" 735 ILCS 5/2-801(4); and (3) the requirement that "the representative parties will fairly and adequately protect the interest of the class." 735 ILCS 5/2-801(3).

I. FACTS RELEVANT TO THE MOTION

CP Partners owned and operated the Comfort Inn O'Hare hotel from 1997 to April 2003. Located near O'Hare International Airport, the hotel had served primarily business travelers since 1988. The Comfort Inn O'Hare used various methods of [***2**] advertising, including direct telephone marketing, in-person solicitations, internet advertising, and fax advertising. The fax advertising at issue in this case involves the use of fax numbers from previous hotel guests, numbers provided through the franchisor, corporate account lists, public directories of service companies and manufacturers, and lists obtained from a third-party vendor. Faxes were directed towards potential guests and to customers with already established business relationships with the Defendant.

Plaintiff seeks recovery under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227 (b)(1)(C). The TCPA, restricts any advertiser from using "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine..." An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. §227 (a)(4).

II LEGAL STANDARD

Class certification is a matter under the broad discretion of the trial court. McCabe v. Burgess, 75 Ill.2d 457, 464 (1979) The class action statute sets out very clearly the requirements for maintenance of a class action:

Prerequisites for the maintenance of a class action. (a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds: (1) The class is so numerous that joinder of all members is impracticable. (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members. (3) The representative parties will fairly and adequately protect the interest of the class. (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801. The consumer class action is an inviting procedural device to address frauds that cause small damages to large groups. Gordon v. Boden, 224 Ill. App. 3d 195, 204 (1991).

[***3**] In cases where there is a substantial number of potential claimants and the individual amounts of their claims are relatively small, Illinois courts have tended to permit the claims to proceed as a class action. Id. at 200.

The Plaintiff moves to classify a group of those recipients of the unsolicited advertisements and alleges that it has met all four requirements of the statute. CP Partners contests three of the alleged requirements. These will be discussed below.

The Court, however, is required to analyze all four statutory elements. The potential class exceeds 33,000 members. The numerosity requirement is met. See Wood River Area Development Corp. v. Germania Federal Savings and Loan, 198 Ill. App. 3d 445 (1990). Common Questions of Law and Fact Rawson puts forth that the common question is whether the Defendant violated the TCPA. He claims that there is a common question of law and fact because the Defendant engaged in a pattern of sending unsolicited fax advertisements. However, CP Partners claims that individual questions of fact predominate because any established business relationship with a fax recipient would preclude a violation of the TCPA. CP Partners also claims that each class member will have to prove that they received the violative fax and that the fax was received on a fax machine, which printed the message.

First, this Court has previously determined that the receipt of the fax on a fax machine that prints the message is not necessarily an element of the federal statute. See Travel 100 Group, Inc. v. Empire Cooler Service, Inc., No. 03CH14510 (Ill. Cir. Ct. Oct. 19, 2004). To be liable under the TCPA, a fax machine must be used to send an unsolicited advertisement to a telephone fax machine. 47 U.S.C. §227 (b)(1)(C). The statute does not address the actual printing receipt of the advertisement in order to recover. Therefore, actual receipt of a printed message by members of the putative class is arguably not indispensable.

It is important to note that the TCPA furthers two important governmental interests. The first is preventing the transfer of advertising costs from the merchandiser to the customer. The second is the adverse effect on commerce caused by the unwanted message occupying the telephone lines and equipment of the consumer. While the [**4**] automatic printing of the message may not be required, some evidence of receipt must be shown otherwise the purpose of the Congress would be frustrated. For example, damages in a private right of action either equal the actual monetary loss or $500. 47 U.S.C. §227 (b)(3). If a plaintiff never received a fax, no actual monetary loss would be present and damages would not be warranted. However, where the evidence suggests that the sender sent multiple messages contemporaneously by use of automated equipment, actual proof of receipt may not be necessary to accomplish the interests of the statute. Information as to whether the telephone transmission was completed would be particularly within the Defendant's knowledge. There is no evidence of failed calls.

Second, the Defendant argues that individual issues predominate commonality. The Defendant asserts that the defined plaintiff class includes recipients that had an established business relationship with the Comfort Inn O'Hare hotel. Because the TCPA prohibits telephone facsimile messages sent without the recipients "prior express permission or consent," but affords an exception to faxes sent to recipients that have given permission or who have an "established business relationship" ("EBR") with the caller, CP partners contends that the commonality requirement is not met. See 47 U.S.C. § 227 (a)(4). This argument ignores the simple fact that the entities to whom the fax was distributed were not called from any existing database maintained by CP Partners. Rather, the list was purchased from a third party vendor who merely accumulated facsimile telephone numbers.

As noted by this Court in Travel 100 Group, Inc., No. 03CH14510 (Ill. Cir. Ct. October 19, 2004), a question as to this element would not defeat the commonality issue of whether the Defendant violated the TCPA. In a class action, the successful adjudication of the Plaintiff's claim will establish the other class members' right to recover. Society of St. Francis v. Dulman, 98 Ill. App. 3d 16, 18 (1981). Where the defendant is alleged to have acted wrongfully in the same basic manner as to an entire class, common class questions dominate the case. Martin v. Heinold Commodities, Inc., 139 Ill.App.3d 1049, 1060 (1985).

Here, the allegation is that the identical action by the Defendant of using a fax machine to send unsolicited advertisements is wrongful to all class members. The process by which the class members prove that the fax they received was unsolicited establishes [***5**] membership in the class. This proof identifies the class, but does not go to the commonality of the question. By certifying this class, this Court is not reaching a finding on the merits of the underlying cause of action, but merely setting the boundaries of the class.

This case can be differentiated from the cases referred to by the Defendant that denied certification due to the class including both, those who had EBRs with the defendant, as well as those who received unsolicited faxes. See Carnett's, Inc. v. Hammond, 610 S.E.2d 529 (Ga. 2005); Kondos v. Lincoln Property Co., 110 S.W.3d 716 (Tex. Ct. App. 2003); Livingston & Westland Marketing, Inc. v. U.S. Bank, 58 P.3d 1088 (Colo. Ct. App. 2002). In those cases, individual inquiries into the facts and circumstances of each recipient's permission to fax were required because the faxes were sent to both those who gave permission and those who did not. This Court also specifically rejects the reasoning of the Georgia Supreme Court in Carnett's, supra. There the Court held there was a possibility that some existing customers may have been included in the facsimile advertising campaign. This possibility defeated class certification. Such an approach is contrary to the intent of Congress as expressed in the TCPA. It is clear to this Court that this legislation scheme was designed to prevent advertisers from transferring their costs to unwilling and unknowing potential customers. Hence, where as here, the advertiser purchased databanks containing facsimile members without editing to identify existing customers, distribution to those machines creates a prima facie violation of the TCPA for all recipients.

Carnett's is also distinguishable from Damas v. Ergotron, Inc., No.

03CH10667 (Ill. Cir. Ct. August 11, 2004), where this Court declined to certify a class of recipients who were frequent recipients of advertising material by mail and telephone facsimile over a long period of time. This Court concluded that this established multiple questions as to the existence of an existing business relationship between the advertiser and the targeted recipient. Here, the Defendant did not limit distribution to customers who stayed at their hotel for even one night. Instead, they distributed materials to more than 30,000 businesses, regardless of prior patronage.

Decisions denying class certification because of uncertainty as to whether certain people in the plaintiff class gave "express invitation or permission," necessitate an [**6**] individualized inquiry into each fax. See Foreman v Data Transfer, Inc., 164 F.R.D. 400 (E.D. Pa. 1995); see also Kenro, Inc. v. Fax Daily Inc., 962 F. Supp. 1162 (S.D. Ind. 1997); Carnett's, Inc. v. Hammond, 610 S.E.2d 529 (Ga. 2005); Livingston & Westland Marketing, Inc. v. U.S. Bank, 58 P.3d 1088 (Colo. Ct. App. 2002). Courts denying class certification for this reason seem to resolve the matter based upon a belief that this form of messaging is occasional or sporadic and not an organized program. As noted, the facts before this Court yield that this Defendant purchased fax numbers from a third-party vendor, sending more than 33,000 faxes to targeted businesses from that vendor list. There is nothing to suggest the existing customers were in any way segregated on the list. It appears that if any of those persons received an advertisement, it was fortuitous. The manner in which the Defendant identified these recipients will not require individualized inquiry. Furthermore, if the Defendant had an EBR with certain recipients of the faxes, production of that evidence may have changed the Court's analysis or excluded those parties from the class.

Appropriate Method for the Fair and Efficient Adjudication of Controversy

The Defendant asserts that a class action certification does not allow for a fair or efficient adjudication. The certification will not be fair because of the potential amount of damages which may be awarded represents an amount significantly greater than the actual monetary injury to the class members and is inconsistent with Congress' intent. In addition, the Defendant contends that class certification violates due process.

To determine if class action is the appropriate method for fair and efficient adjudication, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain. Gordon v. Boden, 224 Ill. App. 3d 195, 203 (1991). It is this Court's opinion that the economies of time, effort and expense, and uniformity will be served by certifying the Plaintiff's class. The predominate question of the Defendant's violation of the TCPA will be resolved in one forum and thus promote efficiency and uniformity. Litigating the individual lawsuits in the present case would be an inefficient use of judicial resources, and addressing the common issues in [**7**] one action would aid judicial administration. See Clark v. TAP Pharm. Prods., Inc., 343 Ill. App. 3d 538, 552 (2003).

As to the Defendant's concerns about the propriety of the amount of damages and Congress' intent, the Court finds helpful and informative the following text from the California Appellate Court:

"[T]he TCPA damages provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements, but also to address and deter the overall public harm caused by such conduct. ... [T]he TCPA was meant to [(1)] 'take into account the difficult[y] [of] quantify[ing] [the] business interruption costs imposed upon recipients of unsolicited fax advertisements, [(2)] effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of "junk faxes," and [(3)] "provide adequate incentive for an individual plaintiff to bring suit on his own behalf." ' ... [S]tatutory damages designed to address such 'public wrongs' need not be 'confined or proportioned to [actual] loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury ...

"... Congress identified two legitimate public harms addressed by the TCPA's ban on junk faxes: (1) unsolicited fax advertisements can substantially interfere with a business or residence because fax machines generally can handle only one message at a time, at the exclusion of other messages; and (2) junk faxes shift nearly all of the advertiser's printing costs to the recipient of the advertisement... [T]he TCPA's $ 500 minimum damages provision, when measured against the overall harms of unsolicited fax advertising and the public interest in deterring such conduct, is not so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.' " (Texas v. American Blastfax, Inc., supra, 121 F. Supp. 2d at pp. 1090-1091.)

As another federal court has stated: "[I]n mathematical terms, a $500 penalty for violation of the TCPA is not so high in relation to actual damages as to violate the Due Process clause. ... [E]ven if the actual monetary costs imposed by advertisers upon the recipients of unsolicited fax advertisements [are] small when compared to the $500 minimum penalty for such conduct, that penalty is not so [***8**] 'severe and oppressive' as to run afoul of the Due Process clause." (Kenro, supra, 962 F. Supp. at pp. 1166-1167; accord, ESI Ergonomic Solutions v. United Artists (2002) 203 Ariz. 94, 100 [50 P.3d 844, 850] (ESI Ergonomic Solutions) ["penalty is not so disproportionate to actual damages as to violate due process"].) Kaufman v. ACS Systems, Inc., 110 Cal. App. 4th 886, 922-923 (Cal. Ct. App., 2003)

The Defendant argues that a more appropriate and intended manner to adjudicate claims under the TCPA is through each State's attorney general. Defendant relies on In re Trans Union Corporation Privacy Litigation, 211 F.R.D. 328 (N.D. Ill. 2002), to support this contention. However, the court in that case was extremely wary of making such a decision calling its result, "anomalous," applying the stricter federal standard in which unfairness based on disproportionate damages defeated a class certification. In re Trans Union Corp. Privacy Litigation., 211 F.R.D. at 351. There, the class members were approximately 190 million individuals and the statutory damages were set at a minimum of $100. The District Court also commented that the Federal Government had already taken administrative action to end the illegal action complained of by the plaintiff. This fact, the court concluded, vitiated any consumer protection concerns.

The Defendant also argues that because the Plaintiff brought this action as an individual, then presumably any of the potential plaintiffs in the class could also bring their own claim. However, a "controlling factor in many cases is that the class action is the only practical means for class members to receive redress, particularly where the claims are small." Gordon, 224 Ill. App. 3d at 203-204. Here, it appears that forcing the class members to pursue their claims individually will make their claims impractical as they will be required to hire counsel in order to receive an award of $500. This result would seriously undermine the goal of the TCPA scheme.

As noted, the potential class is approximately 33,000 persons who received the illegal facsimile message. The actual loss is difficult to measure but the Defendant claimed the actual cost of receiving a message at fifteen cents. The TCPA's statutory penalty is $500, which results in a potential claim of $16,781,500. On its face this appears to be an enormous disparity. However, to claim that this disparity precludes certification is extremely premature and is based to a great deal on conjecture. Basing a [***9**] ruling solely on the disparity also gives the Defendant little incentive to conform its conduct to legal requirements.

The disparity issue is rooted in the concern that great pressure will be placed on defendants to settle such claims in order to avoid financial ruin. See In re Rhone Poulenc Rorer, 51 F. 3d 1293, 1299-1300 (7th Cir. 1995). Henry J. Friendly, Federal Jurisdiction: A General View, 120 (1973). However, the four arguments that support this theory: (1) class actions are not triable; (2) defendants exposure to valid small claims is increased; (3) weak but large claims coerce compromise; and, (4) class actions inherently coerce settlements, are entirely contradictory and not supported by empirical evidence. See Silver, We're Scared to Death: Class Certification and Blackmail, 78 N.Y.U.L. Rev 1357 (2003). These arguments also ignore the fact that the Defendant, if the allegations are proven, broke the law.

Here, the claims can easily be tried. The value of the claims is readily ascertainable and individually, relatively small in number and amount. In addition, it appears the Court has the inherent authority under its power of remitturer to reduce the aggregate amount of the award to avoid the feared consequences, while enforcing the stated goal of the statutory scheme. Parker v. Time Warner Entertainment Company, L.P., 331 F3d 13 (2nd Cir. 2003), Newman, J., concurring at pp 37-47.

Adequate Representation by Proposed Representative, Mr. Rawson

The Defendant argues that the named plaintiff, Mr. Rawson, is not an appropriate class representative. The Defendant contends that Mr. Rawson's business relationship with class counsel creates the appearance of impropriety and due to this relationship asserts that Mr. Rawson cannot carry out his role as a fiduciary for the class.

To determine adequacy of representation, the trial judge must examine two issues: (1) will representation by the proposed class representative protect the absent members of the class who must be afforded due process? Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 339 (1977); and (2) does the attorney have the skill, qualifications and experience to conduct the proposed litigation? Steinberg, 69 Ill. 2d at 339.

Unlike the requirement in Rule 23 of the Federal Rules of Civil Procedure that the claim of the proposed class representative be typical of those of the class, Illinois has [***10**] adopted a more liberal approach. Carrao v. Health Care Service Corp., 118 Ill. App. 3d 417 (1st Dist. 1983). Instead, Illinois requires that the representative fairly, adequately and efficiently represent absent class members. Gordon v. Boden, 224 Ill. App. 3d 195, 203 (1st Dist. 1991).

This requirement has been defined as a showing that the interest of the proposed class representatives are not antagonistic to those of the absent class members. Thus, issues such as slight variations in the claim, Purcell v. Wardrope Chtd. v. Hertz Corp., 175 Ill. App. 3d 1069, 1078 (1st Dist. 1975), or individualized affirmative defenses, Wenhold v. AT & T, 142 Ill. App. 3d 612, 619 (1st Dist. 1986) will not defeat certification. However, in cases where there is evidence of antagonism or collusion, Hansberg v. Lee 311 U.S. 32 (1940), between the proposed representative and absent class members or a close connection with the lawyer representing the proposed class, Barliant v. Follett Corporation, 74 Ill. 2d 266 (1978), class certification should be scrutinized.

Numerous cases cite policy reasons for denial of class certification, due to the possible conflict of interest between the putative class representative and the putative class attorney. For example, courts fear that a class representative who is closely associated with the class attorney could be more likely to settle in a less than favorable manner to the class members. See Stull v. Pool, 63 F.R.D. 702 (S.D.N.Y. 1974); see also Sussman v. Lincoln American Corp.,561 F.2d 86 (7th Cir. 1977). There is also the risk of champerty when a putative class representative has a close relationship with their attorney. See Sussman,561 F.2d 86. Finally, even the mere appearance of impropriety between a putative class representative and the class attorney has resulted in denial of class certification. Kramer v. Scientific Control Corp., 534 F.2d 1085 (3rd Cir. 1976).

Here, the Defendant relies on this Court's decision in Bernstein v. American Family Insurance Company, No. 02CH6905 (Ill. Cir. Ct. July 6, 2005), arguing that class certification should be denied due to Mr. Rawson's relationship with the Edelman firm and the appearance of impropriety. In Bernstein, this Court denied class certification because the class representative selected the Edelman firm as counsel in four other TCPA cases. No. 02CH6905, at *3. This Court reasoned that the cases were brought "not as individual claims by an aggrieved owner of a facsimile machine and telephone line, but [***11**] as a skilled litigant who has culled through the numerous invaders of his privacy to select only those who have collectability." Bernstein, No. 02CH6905, at *3. Furthermore, Bernstein, as class representative, was in a position to settle the case in a way that would maintain his business relationship with the firm, but result in a "less than ideal" outcome for the class members. Id. Finally, Mr. Bernstein and the selected law firm had acted as co-counsel on a resolved and at least one pending class action claim. The holding by this Court hinged on the Court's determination that its fiduciary duty to the absent class members might not be properly discharged because of the business and litigation relationships present.

In this case, Mr. Rawson's relationship with the Edelman firm is arguably extensive, as he has filed at least nine other TCPA class action suits, represented by their firm. This, the Defendants assert, alone creates the potential for impropriety. See Bertstein, No. 02CH6905 at *4. The Plaintiff argues that there is nothing inappropriate about Mr. Rawson's history as a litigant or the fact that he is an attorney.

Citing to In re Lupron Marketing and Sales Litigation, 228 F.R.D. 75 (D. Mass. 2005) (holding that a "professional plaintiffs'" experience with prior similar litigation enhances its role as class representative), the Plaintiff argues that courts often prefer repeat plaintiffs because of their knowledge of the legal issues. However, that case can be differentiated from this matter because the so-called "professional plaintiffs" were not represented by the same attorneys on multiple different actions, as here. 228 F.R.D. at 90. In addition, the court found no evidence the plaintiffs actually had litigated multiple other matters.

Furthermore, the Plaintiff asserts that Mr. Rawson's deposition testimony reveals that he would not be willing to settle individually without protecting the interests of the class. Plaintiff's counsel also posits that should Mr. Rawson do so, the requirement that the court approve any settlement would limit any unfair result. This additional protection provided by the Court, alone does not dismiss the requirement that a person representing a class must protect the absent members of the class "with forthrightness and vigor," and cannot appear to have a possible conflict of interest. See Mersay v. First Republic Corp., 43 F.R.D. 465, 470 (S.D.N.Y. 1968); see also Sussman v. Lincoln American Corp., 561 F.2d at 91.

[***12**] Regardless, in the final analysis, there is nothing to distinguish this Plaintiff from others who for very prudent reasons retain the same counsel for multiple cases. There is no evidence that Mr. Rawson has received any additional compensation or reward in any other case. Nor has there been any question as to the adequacy of any settlement he has negotiated. Finally, there is nothing to suggest that the services he rendered in these other cases were less than required. This situation is distinguishable from that presented in Bernstein, supra., where the attorney and putative class

representative had previous and ongoing professional business relationships that, in this Court's opinion, create conditions which might impact adversely on the absent class members.

IT IS HEREBY ORDERED

1. Plaintiff's Motion for Class Certification is GRANTED.

2. The Court certifies the following class:

All persons who were sent facsimiles of material advertising the commercial availability of any services by or on behalf of C.P. PARTNERS, L.L.C., doing business as COMFORT INN O'HARE and with respect to whom Defendant cannot provide evidence of prior express permission for the sending of such faxes, and which were sent to telephone numbers within Illinois within four years of the date of service of the summons and complaint upon Defendant"

3. This case is continued for case management on October 28, 2005, at 9:45 a.m.

Entered: Patrick E. McGann

Judge 1510

# # #

Printed on Tuesday, October 02, 2012.

EXHIBIT L

Atty. No. 41106

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BALLARD NURSING CENTER, INC.,	)	
	)	
Plaintiff,	)	
	)	10 CH 17229
v.	)	
	)	Judge Cohen
KOHLL'S PHARMACY & HOMECARE, INC.,	)	
and JOHN DOES 1-10,	)	
	)	
Defendants.	)	

DECLARATION OF DANIEL A. EDELMAN

Daniel A. Edelman declares under penalty of perjury, as provided for by 28 U.S.C. §1746, that the following statements are true:

1. Edelman, Combs, Latturner & Goodwin, LLC, has 9 principals, Daniel A. Edelman, Cathleen M. Combs, James O. Latturner, Tara L. Goodwin, Michelle R. Teggelaar, Francis R. Greene, Julie Clark, Heather Kolbus and Thomas E. Soule, and 5 associates.

2. **Daniel A. Edelman** is a 1976 graduate of the University of Chicago Law School. From 1976 to 1981 he was an associate at the Chicago office of Kirkland & Ellis with heavy involvement in the defense of consumer class action litigation (such as the General Motors Engine Interchange cases). In 1981 he became an associate at Reuben & Proctor, a medium-sized firm formed by some former Kirkland & Ellis lawyers, and was made a partner there in 1982. From the end of 1985 he has been in private practice in downtown Chicago. Virtually all of his practice involves litigation on behalf of consumers, mostly through class actions. He is the co-author of Rosmarin & Edelman, Consumer Class Action Manual (2d-4th editions, National Consumer Law Center 1990, 1995 and 1999); author of Collection Defense (Ill. Inst. Cont. Legal Educ. 2008, 2011); Representing Consumers in Litigation with Debt Buyers (Chicago Bar Ass'n 2008); Predatory Mortgage Lending (Ill. Inst. for Cont. Legal. Educ. 2008, 2011), author of Chapter 6, "Predatory Lending and Potential Class Actions," in Real Estate Litigation (Ill. Inst. For Cont. Legal Educ. 2008), Chapter, "Truth in Lending Act," in Illinois Causes of Action (Ill. Inst. For Cont. Legal Educ. 2008, 2011), Chapter, "Fair Debt Collection Practices Act," in Illinois Causes of Action (Ill. Inst. For Cont. Legal Educ. 2011), Predatory Lending and Potential Class Actions, ch. 6 of Illinois Mortgage Foreclosure Practice (Ill. Inst. For Cont. Legal Educ.2003); Predatory Lending and Potential Class Actions, ch. 5 of Real Estate Litigation (Ill. Inst. For Cont. Legal Educ.2004); Illinois Consumer Law, in Consumer Fraud and Deceptive Business Practices Act and Related Areas Update (Chicago Bar Ass'n 2002); Payday Loans: Big Interest Rates and Little Regulation, 11 Loy.Consumer L.Rptr. 174 (1999); author of Consumer Fraud and Insurance Claims, in Bad Faith and Extracontractual Damage Claims in Insurance Litigation, Chicago Bar Ass'n 1992; co-author of Chapter 8, "Fair Debt Collection Practices Act," Ohio Consumer Law (1995 ed.); co-author of Fair Debt Collection: The Need for Private Enforcement, 7 Loy.Consumer L.Rptr. 89 (1995); author of An Overview of The Fair Debt Collection Practices Act, in Financial Services Litigation, Practicing Law Institute (1999);

co-author of Residential Mortgage Litigation, in Financial Services Litigation, Practicing Law Institute (1996); author of Automobile Leasing: Problems and Solutions, 7 Loy.Consumer L.Rptr. 14 (1994); author of Current Trends in Residential Mortgage Litigation, 12 Rev. of Banking & Financial Services 71 (April 24, 1996); author of Applicability of Illinois Consumer Fraud Act in Favor of Out-of-State Consumers, 8 Loy.Consumer L.Rptr. 27 (1996); co-author of Illinois Consumer Law (Chicago Bar Ass'n 1996); co-author of D. Edelman and M. A. Weinberg, Attorney Liability Under the Fair Debt Collection Practices Act (Chicago Bar Ass'n 1996); author of The Fair Debt Collection Practices Act: Recent Developments, 8 Loy.Consumer L. Rptr. 303 (1996); author of Second Mortgage Frauds, Nat'l Consumer Rights Litigation Conference 67 (Oct. 19-20, 1992); and author of Compulsory Arbitration of Consumer Disputes, Nat'l Consumer Rights Litigation Conference 54, 67 (1994). He is a member of the Illinois bar and admitted to practice in the following courts: United States Supreme Court, Seventh Circuit Court of Appeals, First Circuit Court of Appeals, Second Circuit Court of Appeals, Third Circuit Court of Appeals, Fifth Circuit Court of Appeals, Sixth Circuit Court of Appeals, Eighth Circuit Court of Appeals, Ninth Circuit Court of Appeals, Tenth Circuit Court of Appeals, Eleventh Circuit Court of Appeals, United States District Courts for the Northern and Southern Districts of Indiana, United States District Courts for the Northern, Central, and Southern Districts of Illinois, and the Supreme Court of Illinois. He is a member of the Northern District of Illinois trial bar.

3. **Cathleen M. Combs** is a 1976 graduate of Loyola University Law School. From 1984-1991, she supervised the Northwest office of the Legal Assistance Foundation of Chicago, where she was lead or co-counsel in class actions in the areas of unemployment compensation, prison law, social security law, and consumer law. She joined what is now Edelman, Combs, Latturner & Goodwin, LLC in early 1991 and became a named partner in 1993. Her reported decisions include: Nielsen v. Dickerson, 307 F. 3d 623 (7th Cir. 2002); Chandler v. American General Finance, Inc., 329 Ill. App.3d 729, 768 N.E.2d 60 (1st Dist. 2002); Miller v. McCalla Raymer, 214 F. 3d 872 (7th Cir. 2000); Bessette v. Avco Financial Services, 230 F. 3d 439 (1st Cir.2000); and Emery v. American Gen. Fin., Inc., 71 F. 3d 1343 (7th Cir. 1995). She is a member of the Illinois bar and admitted to practice in the following courts: United States District Courts for the Northern, Central and Southern Districts of Illinois, Seventh Circuit Court of Appeals, Third Circuit Court of Appeals, Fifth Circuit Court of Appeals, Tenth Circuit Court of Appeals, and United States District Court for the District of Colorado. She is a member of the Northern District of Illinois trial bar.

4. **James O. Latturner** is a 1962 graduate of the University of Chicago Law School. Until 1969, he was an associate and then a partner at the Chicago law firm of Berchem, Schwanes & Thuma. From 1969 to 1995 he was Deputy Director of the Legal Assistance Foundation of Chicago, where he specialized in consumer law, including acting as lead counsel in over 30 class actions. His publications include Chapter 8 ("Defendants") in Federal Practice Manual for Legal Services Attorneys (M. Masinter, Ed., National Legal Aid and Defender Association 1989); Governmental Tort Immunity in Illinois, 55 Ill.B.J. 29 (1966); Illinois Should Explicitly Adopt the Per Se Rule for Consumer Fraud Act Violations, 2 Loy.Consumer L.Rep. 64 (1990), and Illinois Consumer Law (Chicago Bar Ass'n 1996). He has taught in a nationwide series of 18 Federal Practice courses sponsored by the Legal Services Corporation, each lasting four days and designed for attorneys with federal litigation experience. He has argued over 30 appeals, including two cases in the United States Supreme Court, three in the Illinois Supreme Court, and numerous cases in the Seventh, Third, Fifth, and Eleventh Circuits. Mr. Latturner was involved in many of the significant decisions establishing the rights of Illinois consumers. He is a member of the Northern District of Illinois trial bar.

5. **Tara L. Goodwin** is a graduate of the University of Chicago (B.A., with general honors, 1988)and Illinois Institute of Technology, Chicago-Kent College of Law (J.D., with high honors,1991). She has been with the firm since her graduation and has participated in many of the cases described below. **Reported Cases.** Williams v. Chartwell Financial Services, LTD, 204 F.3d 748 (7th Cir. 2000); Hillenbrand v. Meyer Medical Group, 682 N.E.2d 101 (Ill.1st Dist. 1997), 720 N.E.2d 287 (Ill.1st Dist. 1999); Bessette v. Avco Fin. Servs., 230 F.3d 439 (1st Cir. 2000); Large v. Conseco Fin. Servicing Co., 292 F.3d 49 (1st Cir. 2002);; Carbajal v. Capital One, 219 F.R.D. 437 (N.D.Ill. 2004); Russo v. B&B Catering, 209 F.Supp.2d 857 (N.D.IL 2002); Garcia v. Village of Bensenville, 2002 U.S.Dist. LEXIS 3803 (N.D.Ill.); Romaker v. Crossland Mtg. Co., 1996 U.S.Dist. LEXIS 6490 (N.D.IL); Mount v. LaSalle Bank Lake View, 926 F.Supp. 759 (N.D.Ill 1996). She is a member of the Northern District of Illinois trial bar.

6. **Michelle R. Teggelaar** is a graduate of the University of Illinois (B.A., 1993) and Chicago-Kent College of Law, Illinois Institute of Technology (J.D., with honors, 1997). **Reported Cases:** Johnson v. Revenue Management, Inc., 169 F.3d 1057 (7th Cir.1999); ; Hernandez v. Attention, LLC, 429 F. Supp. 2d 912 (N.D. Ill. 2005); Coelho v. Park Ridge Oldsmobile, Inc., 247 F. Supp. 2d 1004 (N.D. Ill. 2003); Dominguez v. Alliance Mtge., Co., 226 F. Supp. 2d 907 (N.D. Ill. 2002); Watson v. CBSK Financial Group, Inc., 197 F. Supp. 2d 1118 (N.D. Ill. 2002); Van Jackson v. Check 'N Go of Illinois, Inc. 123 F. Supp. 2d 1085 (N.D. Ill. 2000), Van Jackson v. Check 'N Go of Illinois, Inc., 123 F. Supp. 2d 1079, Van Jackson v. Check 'N Go of Illinois, Inc., 114 F. Supp. 2d 731 (N.D. Ill. 2000); Van Jackson v. Check 'N Go of Illinois, Inc., 193 F.R.D. 544 (N.D. Ill. 2000); Vines v. Sands, 188 F.R.D. 302 (N.D. Ill. 1999); Veillard v. Mednick, 24 F. Supp. 2d 863 (N.D. Ill.1998); Sledge v. Sands, 182 F.R.D. 255 (N.D. Ill. 1998), Vines v. Sands, 188 F.R.D. 203 (N.D. Ill. 1999), Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572 (Ind. 2001); Binder v. Atlantic Credit and Finance, Inc., 2007 U.S. Dist. LEXIS 11483 (S.D. Ind. 2007); Carroll v. Butterfield Heath Care, Inc., 2003 WL 22462604 (N.D. Ill. 2003); Payton v. New Century Mtge., Inc., 2003 WL 22349118 (N.D. Ill. 2003); Seidat v. Allied Interstate, Inc., 2003 WL 2146825 (N.D. Ill. 2003) (Report and Recommendation); Michalowski v. Flagstar Bank, FSB, 2002 WL 112905 (N.D. Ill. 2002); Bigalke v. Creditrust Corp., 2001 WL 1098047 (N.D. Ill 2001) (Report and Recommendation); Donnelly v. Illini Cash Advance, 2000 WL 1161076 (N.D. Ill. 2000); Mitchem v. Paycheck Advance Express, 2000 WL 419992 (N.D. Ill 2000); Pinkett v. Moolah Loan Co., 1999 WL 1080596 (N.D. Ill. 1999); Farley v. Diversified Collection Serv., 1999 WL 965496 (N.D. Ill. 1999); Davis v. Commercial Check Control, 1999 WL 965496 (N.D. Ill. 1999); Sledge v. Sands, 1999 WL 261745 (N.D. Ill. 1999); Slater v. Credit Sciences, Inc., 1998 WL 341631 (N.D. Ill. 1998); Slater v. Credit Sciences, Inc., 1998 WL 299803 (N.D. Ill. 1998).

7. **Francis R. Greene** is a graduate of Johns Hopkins University (B.A., with honors, May 1984), Rutgers University (Ph.D., October 1991), and Northwestern University Law School (J.D., 2000). **Reported Cases:** O'Rourke v. Palisades Acquisition XVI, LLC, 635 F.3d 938 (7th Cir. 2011); Ruth v. Triumph Partnerships, 577 F.3d 790 (7th Cir. 2009); Handy v. Anchor Mortgage Corp., 464 F.3d 760 (7th Cir. 2006); Roquet v. Arthur Andersen LLP, 398 F.3d 585 (7th Cir. 2005); Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389 (Ill. 2006); Johnson v. Thomas, 794 N.E.2d 919 (Ill.App.Ct. 2003); Hale v. Afni, Inc., 2010 U.S. Dist. LEXIS 6715 (N.D. Ill. 2010); Parkis v. Arrow Fin Servs., 2008 U.S. Dist. LEXIS 1212 (N.D.Ill. 2008); Foster v. Velocity Investments, 2007 U.S. Dist. LEXIS 63302 (N.D.Ill. 2007); Foreman v. PRA III, LLC, 2007 U.S. Dist. LEXIS 15640 (N.D. Ill. 2007); Schutz v. Arrow Fin. Services, 465 F. Supp. 2d 872 (N.D. Ill. 2006); Pleasant v. Risk Management Alternatives, 2003 WL 22175390 (N.D. Ill. 2003). He is a member of the Northern District of Illinois trial bar.

8. **Julie Clark** (neé Cobalovic) is a graduate of Northern Illinois University (B.A., 1997) and DePaul University College of Law (J.D., 2000). **Reported Cases:** Qualkenbush v. Harris Trust & Savings Bank, 219 F. Supp.2d 935 (N.D. Ill.,2002); Covington-McIntosh v. Mount Glenwood Memory Gardens 2002 WL 31369747 (N.D.Ill.,2002), 2003 WL 22359626 (N.D. Ill. 2003); Record-A-Hit, Inc. v. Nat'l. Fire Ins. Co., 377 Ill. App. 3d 642; 880 N.E.2d 205 (1st Dist. 2007); Western Ry. Devices Corp. v. Lusida Rubber Prods., 06 C 52, 2006 U.S. Dist. LEXIS 43867 (N.D. Ill. June 13, 2006); Nautilus Ins. Co. v. Easy Drop Off, LLC, 06 C 4286, 2007 U.S. Dist. LEXIS 42380 (N.D. Ill. June 4, 2007); Ballard Nursing Center, Inc. v. GF Healthcare Products, Inc., 07 C 5715, 2007 U.S. Dist. LEXIS 84425 (N.D. Ill. Nov. 14, 2007) ; Sadowski v. Med1 Online, LLC, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 17, 2008); Sadowski v. OCO Biomedical, Inc., 08 C 3225, 2008 U.S. Dist. LEXIS 96124 (N.D. Ill. Nov. 25, 2008).

9. **Heather A. Kolbus** (neé Piccirilli) is a graduate of DePaul University (B.S. *cum laude,* 1997), and Roger Williams University School of Law (J.D., 2002). **Reported Cases:** Clark v. Experian Info. Solutions, Inc., 2004 U.S. Dist. LEXIS 28324 (D.S.C. Jan. 14, 2004); DeFrancesco v. First Horizon Home Loan Corp., 2006 U.S. Dist. LEXIS 80718 (S.D. Ill. Nov. 2, 2006); Jeppesen v. New Century Mortgage Corp., 2006 U.S. Dist. LEXIS 84035 (N.D. Ind. Nov. 17, 2006); Benedia v. Super Fair Cellular, Inc., 2007 U.S. Dist. LEXIS 71911 (N.D. Ill. Sept. 26, 2007).

10. **Thomas E. Soule** is a graduate of Stanford University (B.A., 2000), and the University of Wisconsin Law School (J.D., 2003). **Reported Cases:** Murray v. Sunrise Chevrolet, Inc., 441 F.Supp.2d 940 (N.D. Ill. 2006); Iosello v. Leiblys, Inc., 502 F.Supp.2d 782 (N.D. Ill. 2007); Claffey v. River Oaks Hyundai, Inc., 486 F.Supp.2d 776 (N.D. Ill. 2007); Cicilline v. Jewel Food Stores, Inc., 542 F.Supp.2d 842 (N.D.Ill. 2008); Randolph v. Crown Asset Management LLC, 254 F.R.D. 513 (N.D.Ill. 2008); Irvine v. 233 Skydeck LLC, 597 F.Supp.2d 799 (N.D.Ill. 2009); Brittingham v. Cerasimo, Inc., 621 F.Supp.2d 646 (N.D.Ill. 2009); Clark v. Pinnacle Credit Services, LLC, 697 F.Supp.2d 995 (N.D.Ill. 2010); Wendorf v. Landers, 755 F.Supp.2d 972 (N.D.Ill. 2010); QuickClick Loans LLC v. Russell, 407 Ill.App.3d 46; 943 N.E.2d 166 (1st Dist. 2011).

11. Associates

a. **Cassandra P. Miller** is a graduate of the University of Wisconsin – Madison (B.A. 2001) and John Marshall Law School (J.D. *magna cum laude* 2006). **Reported Cases:** Pietras v. Sentry Ins. Co., 513 F.Supp.2d 983 (N.D. Ill. 2007); Hernandez v. Midland Credit Mgmt., 2007 U.S. Dist. LEXIS 16054 (N.D. Ill. Sept. 25, 2007); Balogun v. Midland Credit Mgmt., 2007 U.S. Dist. LEXIS 74845 (S.D. Ind. Oct. 5, 2007); Herkert v. MRC Receivables, Corp, et al., 655 F. Supp. 2d 870 (N.D. Ill. 2008); Miller v. Midland Credit Management, Inc., et al., 621 F. Supp. 2d 621 (N.D. Ill. 2009); Miller v. Midland Credit Management, Inc., et al., 2009 U.S. Dist. LEXIS 16273 (N.D. Ill. 2009); Frydman v. Portfolio Recovery Associates, LLC, 2011 U.S. Dist. LEXIS 69502 (N.D. Ill. 2011).

b. **Tiffany N. Hardy** is a graduate of Tuskegee University (B.A. 1998) and Syracuse University College of Law (J.D.2001). **Reported cases:** Unifund v. Shah, 2001 Ill. App. LEXIS 61 (Ill. App. Feb. 1, 2011); Balbarin et. al. v. North Star et. al., 2011 U.S. Dist. LEXIS 686 (N.D. Ill. Jan. 5, 2011)(class certified); Manlapaz v. Unifund, 2009 U.S. Dist. LEXIS 85527 (N.D. Ill. Sept. 15, 2009); Matmanivong v. Unifund, 2009 U.S. Dist. LEXIS 36287 (N.D. Ill. Apr. 28, 2009); Kubiski v. Unifund, 2009 U.S. Dist. LEXIS 26754 (N.D. Ill. Mar. 25, 2009); Cox v. Unifund CCR Partners, 2008 C 1005 (N.D. Ill. Dec. 4, 2008) (Report and Recommendation for Class Certification); Ramirez v. Palisades Collection, LLC, 2008 U.S. Dist. LEXIS 48722 (N.D. Ill. June 23, 2008)(class certified); 2008 U.S. Dist. LEXIS 24921 (N.D. Ill. Mar. 28, 2008); Cotton/Scott v. Asset Acceptance, 2008 U.S. Dist. LEXIS 49042 (N.D. Ill. June 26, 2008) (class certified); Ketchem v. American Acceptance Co., LLC, 641 F. Supp. 2d 782, 2008 U.S. Dist. LEXIS 49532 (N.D. Ind. June 26, 2008); D'Elia v. First Capital, 2008 U.S. Dist. LEXIS 22461 (N.D. Ill. Mar. 19, 2008).

c. **Zachary A. Jacobs** is a graduate of the University of South Dakota (B.S. 2002) and Chicago-Kent College of Law, Illinois Institute of Technology (J.D. 2007).

d. **Rupali R. Shah** is a graduate of the University of Chicago (B.A. 2004) and University of Illinois (J.D. *cum laude* 2007).

e. **Catherine A. Ceko** is a graduate of Northwestern University (B.A. 2005) and DePaul University (J.D. *summa cum laude* 2008). **Reported cases:** Vance v. Bureau of Collection Recovery, LLC,2011 U.S. Dist. LEXIS 24908 (N.D. Ill. 2011).

12. The firm also has 15 legal assistants, as well as other support staff.

13. Since its inception, the firm has recovered more than $500 million for consumers. The types of cases handled by the firm are illustrated by the following:

14. Mortgage charges and servicing practices: The firm has been involved in dozens of cases, mostly class actions, complaining of illegal charges on mortgages and improper servicing practices. These include MDL-899, In re Mortgage Escrow Deposit Litigation, and MDL-1604, In re Ocwen Federal Bank FSB Mortgage Servicing Litigation, as well as the Fairbanks mortgage servicing litigation. Decisions in the firm's mortgage cases include: ; Hamm v. Ameriquest Mortg. Co., 506 F.3d 525 (7th Cir. 2007); Handy v. Anchor Mortg. Corp., 464 F.3d 760 (7th Cir. 2006); Christakos v. Intercounty Title Co., 196 F.R.D. 496 (N.D.Ill. 2000); Johnstone v. Bank of America, N.A., 173 F.Supp.2d 809 (N.D.Ill. 2001); Leon v. Washington Mut. Bank, F.A., 164 F.Supp.2d 1034 (N.D.Ill. 2001); Williamson v. Advanta Mortg. Corp., 1999 U.S. Dist. LEXIS 16374 (N.D.Ill., Oct. 5, 1999); McDonald v. Washington Mut. Bank, F.A., 99 C 6884, 2000 U.S. Dist. LEXIS 11496 (N.D.Ill., June 22, 2000); Metmor Financial, Inc. v. Eighth Judicial District Court, No. 23848 (Nev.Sup.Ct., Apr. 27, 1993); GMAC Mtge. Corp. v. Stapleton, 236 Ill.App.3d 486, 603 N.E.2d 767 (1st Dist. 1992), leave to appeal denied, 248 Ill.2d 641, 610 N.E.2d 1262 (1993); Leff v. Olympic Fed. S. & L. Ass'n, 1986 WL 10636 (N.D.Ill. 1986); Aitken v. Fleet Mtge. Corp., 90 C 3708, 1991 U.S.Dist. LEXIS 10420 (N.D.Ill. 1991), and 1992 U.S.Dist. LEXIS 1687 (N.D.Ill., Feb. 12, 1992); Poindexter v. National Mtge. Corp., 91 C 4223, 1991 U.S.Dist. LEXIS 19643 (N.D.Ill., Dec. 23, 1991), later opinion, 1995 U.S.Dist. LEXIS 5396 (N.D.Ill., April 24, 1995); Sanders v. Lincoln Service Corp., 91 C 4542,1993 U.S.Dist. LEXIS 4454 (N.D.Ill. April 5, 1993); Robinson v. Empire of America Realty Credit Corp., 90 C 5063, 1991 U.S.Dist. LEXIS 2084 (N.D.Ill., Feb. 20, 1991); In re Mortgage Escrow Deposit Litigation, M.D.L. 899, 1994 U.S.Dist. LEXIS 12746 (N.D.Ill., Sept. 8, 1994); Greenberg v. Republic Federal S. & L. Ass'n, 94 C 3789, 1995 U.S.Dist. LEXIS 5866 (N.D.Ill., May 1, 1995).

15. The recoveries in the escrow overcharge cases alone are over $250 million. Leff was the seminal case on mortgage escrow overcharges.

16. The escrow litigation had a substantial effect on industry practices, resulting in limitations on the amounts which mortgage companies held in escrow.

17. **Bankruptcy:** The firm brought a number of cases complaining that money was being systematically collected on discharged debts, in some cases through the use of invalid reaffirmation agreements, including the national class actions against Sears and General Electric. Conley v. Sears, Roebuck, 1:97cv11149 (D.Mass); Fisher v. Lechmere Inc., 1:97cv3065 (N.D.Ill.). These cases were settled and resulted in recovery by nationwide classes. Cathleen Combs successfully argued the first Court of Appeals case to hold that a bankruptcy debtor induced to pay a discharged debt by means of an invalid reaffirmation agreement may sue to recover the payment. Bessette v. Avco Financial Services, 230 F.3d 439 (1st Cir. 2000).

18. **Automobile sales and financing practices:** The firm has brought many cases challenging practices relating to automobile sales and financing, including:

a. Hidden finance charges resulting from pass-on of discounts on auto purchases. Walker v. Wallace Auto Sales, Inc., 155 F.3d 927 (7th Cir. 1998).

b. Misrepresentation of amounts disbursed for extended warranties. Taylor v. Quality Hyundai, Inc., 150 F.3d 689 (7th Cir. 1998); Grimaldi v. Webb, 282 Ill.App.3d 174, 668 N.E.2d 39 (1st Dist. 1996), leave to appeal denied, 169 Ill.2d 566 (1996); Slawson v. Currie Motors Lincoln Mercury, Inc., 94 C 2177, 1995 U.S.Dist. LEXIS 451 (N.D.Ill., Jan. 5, 1995); Cirone-Shadow v. Union Nissan, Inc., 94 C 6723, 1995 U.S.Dist. LEXIS 1379 (N.D.Ill., Feb. 3, 1995), later opinion, 1995 U.S.Dist. LEXIS 5232 (N.D.Ill., April 20, 1995) (same); Chandler v. Southwest Jeep-Eagle, Inc., 162 F.R.D. 302 (N.D.Ill. 1995); Shields v. Lefta, Inc., 888 F. Supp. 891 (N.D.Ill. 1995).

c. Spot delivery. Janikowski v. Lynch Ford, Inc., 98 C 8111, 1999 U.S. Dist. LEXIS 3524 (N.D.Ill., March 11, 1999); Diaz v. Westgate Lincoln Mercury, Inc., 93 C 5428, 1994 U.S.Dist. LEXIS 16300 (N.D.Ill. Nov. 14, 1994); Grimaldi v. Webb, 282 Ill.App.3d 174, 668 N.E.2d 39 (1st Dist. 1996), leave to appeal denied, 169 Ill.2d 566 (1996).

d. Force placed insurance. Bermudez v. First of America Bank Champion, N.A., 860 F.Supp. 580 (N.D.Ill. 1994); Travis v. Boulevard Bank, 93 C 6847, 1994 U.S.Dist. LEXIS 14615 (N.D.Ill., Oct. 13, 1994), modified, 880 F.Supp. 1226 (N.D.Ill., 1995); Moore v. Fidelity Financial Services, Inc., 884 F. Supp. 288 (N.D.Ill. 1995).

e. Improper obligation of cosigners. Lee v. Nationwide Cassell, 174 Ill.2d 540, 675 N.E.2d 599 (1996); Taylor v. Trans Acceptance Corp., 267 Ill.App.3d 562, 641 N.E.2d 907 (1st Dist. 1994), leave to appeal denied, 159 Ill.2d 581, 647 N.E.2d 1017 (1995); Qualkenbush v. Harris Trust & Sav. Bank, 219 F. Supp. 2d 935 (N.D. Ill. 2002).

f. Evasion of FTC holder rule. Brown v. LaSalle Northwest Nat'l Bank, 148 F.R.D. 584 (N.D.Ill. 1993), 820 F.Supp. 1078 (N.D.Ill. 1993), and 92 C 8392, 1993 U.S.Dist. LEXIS 11419 (N.D.Ill., Aug. 13, 1993).

19. These cases also had a substantial effect on industry practices. The warranty cases, such as Grimaldi, Gibson, Slawson, Cirone-Shadow, Chandler, and Shields, resulted in the Federal Reserve Board's revision of applicable disclosure requirements, so as to prevent car dealers from representing that the charge for an extended warranty was being

disbursed to a third party when that was not in fact the case.

20. Predatory lending practices: The firm has brought numerous cases challenging predatory mortgage and "payday" lending practices, both as individual and class actions. Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572 (Ind. Sup. Ct. 2001); Hamm v. Ameriquest Mortg. Co., 506 F.3d 525 (7th Cir. 2007); Handy v. Anchor Mortg. Corp., 464 F.3d 760 (7th Cir. 2006); Williams v. Chartwell Fin. Servs., 204 F.3d 748 (7th Cir. 2000); Hubbard v. Ameriquest Mortg. Co., 05 C 389, 2008 U.S. Dist. LEXIS 75799 (N.D.Ill., September 30, 2008); Martinez v. Freedom Mortg. Team, Inc., 527 F. Supp. 2d 827 (N.D.Ill. 2007); Pena v. Freedom Mortg. Team, Inc., 07 C 552, 2007 U.S. Dist. LEXIS 79817 (N.D.Ill., October 24, 2007); Miranda v. Universal Fin. Group, Inc., 459 F. Supp. 2d 760 (N.D.Ill. 2006); Parker v. 1-800 Bar None, a Financial Corp., Inc., 01 C 4488, 2002 WL 215530 (N.D.Ill., Feb. 12, 2002); Gilkey v. Central Clearing Co., 202 F.R.D. 515 (E.D.Mich. 2001); Van Jackson v. Check 'N Go of Ill., Inc., 114 F.Supp.2d 731 (N.D.Ill. 2000), later opinion, 193 F.R.D. 544 (N.D.Ill. 2000), 123 F.Supp. 2d 1079 (N.D.Ill. 2000), later opinion, 123 F.Supp. 2d 1085 (N.D.Ill. 2000); Henry v. Cash Today, Inc., 199 F.R.D. 566 (S.D.Tex. 2000); Donnelly v. Illini Cash Advance, Inc., 00 C 94, 2000 WL 1161076, 2000 U.S. Dist. LEXIS 11906 (N.D.Ill., Aug. 14, 2000); Jones v. Kunin, 99-818-GPM, 2000 U.S. Dist. LEXIS 6380 (S.D.Ill., May 1, 2000); Davis v. Cash for Payday, 193 F.R.D. 518 (N.D.Ill. 2000); Reese v. Hammer Fin. Corp., 99 C 716, 1999 U.S. Dist. LEXIS 18812, 1999 WL 1101677 (N.D.Ill., Nov. 29, 1999); Pinkett v. Moolah Loan Co., 99 C 2700, 1999 U.S. Dist. LEXIS 17276 (N.D.Ill., Nov. 1, 1999); Gutierrez v. Devon Fin. Servs., 99 C 2647, 1999 U.S. Dist. LEXIS 18696 (N.D.Ill., Oct. 6, 1999); Vance v. National Benefit Ass'n, 99 C 2627, 1999 WL 731764, 1999 U.S. Dist. LEXIS 13846 (N.D.Ill., Aug. 26, 1999).

21. Other consumer credit issues: The firm has also brought a number of other Truth in Lending and consumer credit cases, mostly as class actions, involving such issues as:

a. Phony nonfiling insurance. Edwards v. Your Credit Inc., 148 F.3d 427 (5th Cir. 1998); Adams v. Plaza Finance Co., 168 F.3d 932 (7th Cir. 1999); Johnson v. Aronson Furniture Co., 96 C 117, 1997 U.S. Dist. LEXIS 3979 (N.D. Ill., March 31, 1997).

b. The McCarran Ferguson Act exemption. Autry v. Northwest Premium Services, Inc., 144 F.3d 1037 (7th Cir. 1998).

c. Loan flipping. Emery v. American General, 71 F.3d 1343 (7th Cir.1995). Emery limited the pernicious practice of "loan flipping," in which consumers are solicited for new loans and are then refinanced, with "short" credits for unearned finance charges and insurance premiums being given through use of the "Rule of 78s."

d. Home improvement financing practices. Fidelity Financial Services, Inc. v. Hicks, 214 Ill.App.3d 398, 574 N.E.2d 15 (1st Dist. 1991), leave to appeal denied, 141 Ill.2d 539, 580 N.E.2d 112; Heastie v. Community Bank of Greater Peoria, 690 F.Supp. 716 (N.D.Ill. 1989), later opinion, 125 F.R.D. 669 (N.D.Ill. 1990), later opinions, 727 F.Supp. 1133 (N.D.Ill. 1990), and 727 F.Supp. 1140 (N.D.Ill. 1990). Heastie granted certification of a class of over 6,000 in a home improvement fraud case.

e. Arbitration clauses. Wrightson v. ITT Financial Services, 617 So.2d 334 (Fla. 1st DCA 1993).

f. Insurance packing. Elliott v. ITT Corp., 764 F.Supp. 102 (N.D.Ill. 1990), later opinion, 150 B.R. 36 (N.D.Ill. 1992).

22. Automobile leases: The firm has brought a number of a cases alleging illegal charges and improper disclosures on automobile leases, mainly as class actions. Decisions in these cases include Lundquist v. Security Pacific Automotive Financial Services Corp., Civ. No. 5:91-754 (TGFD) (D.Conn.), aff'd, 993 F.2d 11 (2d Cir. 1993); Kedziora v. Citicorp Nat'l Services, Inc., 780 F.Supp. 516 (N.D.Ill. 1991), later opinion, 844 F.Supp. 1289 (N.D.Ill. 1994), later opinion, 883 F.Supp. 1144 (N.D.Ill. 1995), later opinion, 91 C 3428, 1995 U.S.Dist. LEXIS 12137 (N.D.Ill., Aug. 18, 1995), later opinion, 1995 U.S.Dist. LEXIS 14054 (N.D.Ill., Sept. 25, 1995); Johnson v. Steven Sims Subaru and Subaru Leasing, 92 C 6355, 1993 U.S.Dist. LEXIS 8078 (N.D.Ill., June 9, 1993), and 1993 U.S.Dist. LEXIS 11694 (N.D.Ill., August 20, 1993); McCarthy v. PNC Credit Corp., 2:91CV00854 (PCD), 1992 U.S.Dist. LEXIS 21719 (D.Conn., May 27, 1992); Kinsella v. Midland Credit Mgmt., Inc., 91 C 8014, 1992 U.S.Dist. LEXIS 1405, 1992 WL 26908 (N.D.Ill. 1992); Highsmith v. Chrysler Credit Corp., 18 F.3d 434 (7th Cir. 1994); Black v. Mitsubishi Motors Credit of America, Inc., 94 C 3055, 1994 U.S.Dist. LEXIS 11158 (N.D.Ill., August 10, 1994); Simon v. World Omni Leasing Inc., 146 F.R.D. 197 (S.D.Ala. 1992). Settlements in such cases include Shepherd v. Volvo Finance North America, Inc., 1-93-CV-971 (N.D.Ga.)($8 million benefit); McCarthy v. PNC Credit Corp., 291 CV 00854 PCD (D.Conn.); Lynch Leasing Co. v. Moore, 90 CH 876 (Circuit Court of Cook County, Illinois) (class in auto lease case was certified for litigation purposes, partial summary judgment was entered, and case was then settled); Blank v. Nissan Motor Acceptance Corp., 91 L 8516 (Circuit Court of Cook County, Illinois); Mortimer v. Toyota Motor Credit Co., 91 L 18043 (Circuit Court of Cook County, Illinois); Duffy v. Security Pacific Automotive Financial Services, Inc., 93-729 IEG (BTM) (S.D.Cal., April 28, 1994).

23. Lundquist and Highsmith are leading cases; both held that commonly-used lease forms violated the Consumer Leasing Act. As a result of the Lundquist case, the Federal Reserve Board completely revamped the disclosure requirements applicable to auto leases, resulting in vastly improved disclosures to consumers.

24. Collection practices: The firm has brought a number of cases under the Fair Debt Collection Practices Act, both class and individual. Decisions in these cases include: Jenkins v. Heintz, 25 F.3d 536 (7th Cir. 1994), aff'd 514 U.S. 291 (1995) (FDCPA coverage of attorneys); Fields v. Wilber Law Firm, P.C., 383 F.3d 562 (7th Cir. 2004); Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003) (coverage of debt buyers); Peter v. GC Servs. L.P., 310 F.3d 344 (5th Cir. 2002); Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002) (attorney letters without attorney involvement); Boyd v. Wexler, 275 F.3d 642 (7th Cir. 2001); Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000); Johnson v. Revenue Management Corp., 169 F.3d 1057 (7th Cir. 1999); Keele v. Wexler & Wexler, 1996 U.S.Dist. LEXIS 3253 (N.D.Ill., March 18, 1996) (class), 1995 U.S.Dist. LEXIS 13215 (N.D.Ill. 1995) (merits), aff'd, 149 F.3d 589 (7th Cir. 1998); Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997); Maguire v. Citicorp Retail Services, Inc., 147 F.3d 232 (2nd Cir. 1998); Young v. Citicorp Retail Services, Inc., .97-9397, 1998 U.S.App. LEXIS 20268 (2nd Cir. 1998); Charles v. Lundgren & Assocs., P.C., 119 F.3d 739 (9th Cir. 1997); Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996), aff'g Avila v. Van Ru Credit Corp., 94 C 3234, 1995 U.S.Dist. LEXIS 461 (N.D.Ill., Jan. 10, 1995), later opinion, 1995 U.S.Dist. LEXIS 1502 (N.D.Ill., Feb. 6, 1995), later opinion, 1995 U.S.Dist. LEXIS 17117 (N.D.Ill., Nov. 14, 1995); Tolentino v. Friedman, 833 F.Supp. 697 (N.D.Ill. 1993), aff'd in part and rev'd in part, 46 F.3d 645 (7th Cir. 1995); Ramirez v. Apex Fin. Mgmt., LLC, 567 F. Supp. 2d 1035 (N.D.Ill. 2008); Cotton v. Asset Acceptance, LLC, 07 C

5005, 2008 U.S. Dist. LEXIS 49042 (N.D.Ill., June 26, 2008); Buford v. Palisades Collection, LLC, 552 F. Supp. 2d 800 (N.D.Ill. 2008); Martin v. Cavalry Portfolio Servs., LLC, 07 C 4745, 2008 U.S. Dist. LEXIS 25904 (N.D.Ill., March 28, 2008); Ramirez v. Palisades Collection LLC, 250 F.R.D. 366 (N.D.Ill. 2008); Hernandez v. Midland Credit Mgmt., 04 C 7844, 2007 U.S. Dist. LEXIS 16054 (N.D.Ill., March 6, 2007, amended Sept. 25, 2007) (balance transfer program); Blakemore v. Pekay, 895 F.Supp.972 (N.D.Ill. 1995); Oglesby v. Rotche, 93 C 4183, 1993 U.S.Dist. LEXIS 15687 (N.D.Ill., Nov. 4, 1993), later opinion, 1994 U.S.Dist. LEXIS 4866 (N.D.Ill., April 15, 1994); Laws v. Cheslock, 98 C 6403, 1999 U.S.Dist. LEXIS 3416 (N.D.Ill., Mar. 8, 1999); Davis v. Commercial Check Control, Inc., 98 C 631, 1999 U.S. Dist. LEXIS 1682 (N.D.Ill., Feb. 12, 1999); Hoffman v. Partners in Collections, Inc., 93 C 4132, 1993 U.S.Dist. LEXIS 12702 (N.D.Ill., Sept. 15, 1993); Vaughn v. CSC Credit Services, Inc., 93 C 4151, 1994 U.S.Dist. LEXIS 2172 (N.D.Ill., March 1, 1994), adopted, 1995 U.S.Dist. LEXIS 1358 (N.D.Ill., Feb. 3, 1995); Beasley v. Blatt, 93 C 4978, 1994 U.S.Dist. LEXIS 9383 (N.D.Ill., July 14, 1994); Taylor v. Fink, 93 C 4941, 1994 U.S.Dist. LEXIS 16821 (N.D.Ill., Nov. 23, 1994); Gordon v. Fink, 93 C 4152, 1995 U.S.Dist. LEXIS 1509 (N.D.Ill., Feb. 7, 1995); Brujis v. Shaw, 876 F.Supp. 198 (N.D.Ill. 1995).

25. Jenkins v. Heintz is a leading decision regarding the liability of attorneys under the Fair Debt Collection Practices Act. I argued it before the Supreme Court and Seventh Circuit. Avila v. Rubin is a leading decision on phony "attorney letters."

26. Fair Credit Reporting Act: The firm has filed numerous cases under the Fair Credit Reporting Act, primarily as class actions. One line of cases alleges that lenders and automotive dealers, among others, improperly accessed consumers' credit information, without their consent and without having a purpose for doing so permitted by the FCRA. Important decisions in this area include: Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004), Murray v. GMAC Mortgage Corp., 434 F.3d 948 (7th Cir. 2006); Perry v. First National Bank, 459 F.3d 816 (7th Cir. 2006); Murray v. Sunrise Chevrolet, Inc., 441 F. Supp.2d 940 (N.D. Ill. 2006); Shellman v. Countrywide Home Loans, Inc., 1:05-CV-234-TS, 2007 U.S. Dist. LEXIS 27491 (N.D.Ind., April 12, 2007); In re Ocean Bank, 06 C 3515, 2007 U.S. Dist. LEXIS 28973 (N.D.Ill., March 16, 2007), later opinion, 2007 U.S. Dist. LEXIS 29443 (N.D. Ill., Apr. 9, 2007); Asbury v. People's Choice Home Loan, Inc., 05 C 5483, 2007 U.S. Dist. LEXIS 17654 (N.D.Ill., March 12, 2007); Claffey v. River Oaks Hyundai, Inc., 238 F.R.D. 464 (N.D.Ill. 2006); Murray v. IndyMac Bank, FSB, 461 F.Supp.2d 645 (N.D.Ill. 2006); Kudlicki v. Capital One Auto Finance, Inc., 2006 U.S. Dist. LEXIS 81103 (N.D. Ill., Nov. 2, 2006); Thomas v. Capital One Auto Finance, Inc., 2006 U.S. Dist. LEXIS 81358 (N.D. Ill., Oct. 24, 2006); Pavone v. Aegis Lending Corp., 2006 U.S. Dist. LEXIS 62157 (N.D. Ill., Aug. 31, 2006); Murray v. E*Trade Financial Corp., 2006 U.S. Dist. LEXIS 53945 (N.D. Ill., July 19, 2006); Bonner v. Home 123 Corp., 2006 U.S. Dist. LEXIS 37922 (N.D. Ind., May 25, 2006); Murray v. Sunrise Chevrolet , Inc., 2006 U.S. Dist. LEXIS 19626 (N.D. Ill., Mar. 30, 2006); and Murray v. Finance America, LLC, 2006 U.S. Dist. LEXIS 7349 (N.D. Ill., Jan 5, 2006). More than 15 such cases have been settled on a classwide basis.

27. Class action procedure: Important decisions include Crawford v. Equifax Payment Services, Inc., 201 F.3d 877 (7th Cir. 2000); Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir. 1999); Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997); and Gordon v. Boden, 224 Ill.App.3d 195, 586 N.E.2d 461 (1st Dist. 1991).

28. Landlord-tenant: The firm has brought more than 20 class actions against landlords to enforce tenants' rights. Claims include failing to pay interest on security deposits or commingling security deposits. Reported decisions include Wang v. Williams, 343 Ill. App. 3d 495; 797 N.E.2d 179 (5th Dist. 2003); Dickson v. West Koke Mill Vill. P'Ship, 329 Ill. App. 3d 341; 769 N.E.2d 971 (4th Dist. 2002); and Onni v. Apt. Inv. & Mgmt. Co., 344 Ill. App. 3d 1099; 801 N.E.2d 586 (2nd Dist. 2003).

29. **Insurance litigation:** Often securing recovery for a class requires enforcement of the rights under the defendant's insurance policy. The firm has extensive experience with such litigation. Reported decisions in such cases include: American Family Mut. Ins. Co. v. C.M.A. Mortg., Inc., 1:06-cv-1044-SEB-JMS, 2008 U.S. Dist. LEXIS 30233 (S.D.Ind. March 31, 2008); Record-A-Hit, Inc. v. Nat'l Fire Ins. Co., 377 Ill. App. 3d 642; 880 N.E.2d 205 (1st Dist. 2007); Pietras v. Sentry Ins. Co., 06 C 3576, 2007 U.S. Dist. LEXIS 16015 (N.D.Ill., March 6, 2007), later opinion, 513 F. Supp. 2d 983 (N.D.Ill. 2007); Auto-Owners Ins. Co. v. Websolv Computing, Inc., 06 C 2092, 2007 U.S. Dist. LEXIS 65339 (N.D.Ill., Aug. 31, 2007); Nat'l Fire Ins. Co. v. Tri-State Hose & Fitting, Inc., 06 C 5256, 2007 U.S. Dist. LEXIS 45685 (N.D.Ill., June 21, 2007): Nautilus Ins. Co. v. Easy Drop Off, LLC, 06 C 4286, 2007 U.S. Dist. LEXIS 42380 (N.D.Ill., June 4, 2007).

30. **Debtors' rights**. Important decisions include: Ramirez v. Palisades Collection LLC, 07 C 3840, 2008 U.S. Dist. LEXIS 48722 (N.D.Ill., June 23, 2008) (Illinois statute of limitations for credit card debts); Parkis v. Arrow Fin. Servs., 07 C 410, 2008 U.S. Dist. LEXIS 1212 (N.D. Ill., Jan. 8, 2008) (same); Rawson v. Credigy Receivables, Inc., 05 C 6032, 2006 U.S. Dist. LEXIS 6450 (N.D.Ill., Feb. 16, 2006) (same); Jones v. Kunin, 99-818-GPM, 2000 U.S. Dist. LEXIS 6380 (S.D.Ill., May 1, 2000) (scope of Illinois bad check statute); Qualkenbush v. Harris Trust & Sav. Bank, 219 F. Supp. 2d 935 (N.D. Ill. 2002) (failure to allow cosigner to take over obligation prior to collection action); Wilson v. Harris N.A., 06 C 5840, 2007 U.S. Dist. LEXIS 65345 (N.D.Ill., September 4, 2007).

31. **Telephone Consumer Protection Act.** The firm has brought a number of cases under the "junk fax" and "spam text message" provisions of the statute. Important decisions include: Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005); Sadowski v. Med1 Online, LLC, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); Benedia v. Super Fair Cellular, Inc., 07 C 01390, 2007 U.S. Dist. LEXIS 71911 (N.D.Ill., September 26, 2007); Centerline Equip. Corp. v. Banner Pers. Serv., 545 F. Supp. 2d 768 (N.D.Ill. 2008).

32. Some of the other reported decisions in our cases include: Elder v. Coronet Ins. Co., 201 Ill.App.3d 733, 558 N.E.2d 1312 (1st Dist. 1990); Smith v. Keycorp Mtge., Inc., 151 B. R. 870 (N.D.Ill. 1992); Gordon v. Boden, 224 Ill.App.3d 195, 586 N.E.2d 461 (1st Dist. 1991), leave to appeal denied, 144 Ill.2d 633, 591 N.E.2d 21, cert. denied, U.S. (1992); Armstrong v. Edelson, 718 F.Supp. 1372 (N.D.Ill. 1989); Newman v. 1st 1440 Investment, Inc., 89 C 6708, 1993 U.S.Dist. LEXIS 354 (N.D.Ill. Jan. 15, 1993); Mountain States Tel. & Tel. Co. v. District Court, 778 P.2d 667 (Colo. 1989); Disher v. Fulgoni, 124 Ill.App.3d 257, 464 N.E.2d 639, 643 (1st Dist. 1984); Harman v. Lyphomed, Inc., 122 F.R.D. 522 (N.D.Ill. 1988); Haslam v. Lefta, Inc., 93 C 4311, 1994 U.S.Dist. LEXIS 3623 (N.D.Ill., March 25, 1994); Source One Mortgage Services Corp. v. Jones, 88 C 8441, 1994 U.S.Dist. LEXIS 333 (N.D.Ill., Jan. 13, 1994).

33. Gordon v. Boden is the first decision approving "fluid recovery" in an Illinois class action. Elder v. Coronet Insurance held that an insurance company's reliance on lie detectors to process claims was an unfair and deceptive trade practice.

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